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APPLICATION OF THE STATE IMMUNITY RULE IN THE INTERNATIONAL
CRIMINAL JUSTICE SYSTEM: PROBLEMS ARISING AND A CRITIQUE OF LEGAL
RESPONSE MECHANISMS

by

Celestine Nchekwube Ezennia

Submitted in partial fulfillment of the requirements
for the degree of Master of Laws

at

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DEDICATION

To my darling wife, Mrs. Juliet Nneuwa Ezennia, and my beloved daughter, Miss Ifeoma Favour Miracle Nchekwube, for all their love, care and support.

To Michelle Kirkwood of the Schulich School of Law, Dalhousie University, for all her encouragement, care and support.

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ABSTRACT

The state immunity rule was founded upon such sound rationales as respect for the sovereign equality of all states and non-interference with state functions. However, its application in the international criminal justice system produces numerous problems. These include impunity for violation of peremptory international legal norms (like the prohibitions on serious international crimes) and violation of human rights. It also undermines the individual accountability and justice administration missions of the system because it shields state officials from criminal responsibility and subjects their victims to injustice. The international community has adopted various legal mechanisms which attempt to respond to these problems by abolishing state immunity for international crimes. However, some weaknesses, including external political influence, selective justice, and lopsided implementation against developing states, render the mechanisms sometimes ineffective. This thesis examines the problems arising from the rule's application, evaluates the response mechanism's strengths and weaknesses, and suggests reforms in the mechanisms.

LIST OF ABBREVIATIONS USED

AC	Appeal Cases
AJICL	African Journal of International and Comparative Law
AJIL	American Journal of International Law
AJLH	Australian Journal of Legal History
AMICC	American Non-Governmental Organizations Coalition for the International Criminal Court
All ER	All England Reports
Am U Int'l L Rev	American University International Law Review
Ann Rev Pol Sc	Annual Review of Political Science
Arizona JICL	Arizona Journal of International and Comparative Law
ASCL	African Society of International and Comparative Law
Asia-Pacific LPJ	Asia-Pacific Law and Policy Journal
ASPA	American Servicemembers' Protection Act
AU	African Union
AUDJ	Acta Universitatis Danubius Juridica
Aus J Pub & Int'l L	Australian Journal of Public and International Law
Berkeley JIL	Berkeley Journal of International Law
BIA	Bilateral Immunity Agreement
BJCLCJ	Bergen Journal of Criminal law and Criminal Justice
Brit J Criminol	British Journal of Criminology
Brussels JIS	Brussels Journal of International Studies
BYIL	British Yearbook of International Law
Cal L Rev	California Law Review

Cap	Caption
CAR	Central African Republic
Cardozo LR	Cardozo Law Review
Cass Crim	Chambre Ciminelle (Criminal Division of the French Court of Cassation)
CCMES	Critique: Critical Middle Eastern Studies
CDIPH	Clinique de Droit International Penal et Humanitaire
Ch	Chancery Division
Chicago-Kent L Rev	Chicago-Kent Law Review
CICC	Coalition for the International Criminal Court
Cir	Circuit
CJ	Chief Justice
CJIP	Chinese Journal of International Politics
CLF	Criminal Law Forum
CONF	Conference
Crime Law Soc Change	Crime, Law and Social Change
CRT	Critical Race Theory
CUPID	Columbia University partnership for International Development
CWRJIL	Case Western Reserve Journal of International Law
CYIL	Czech Yearbook of International Law
Deakin L Rev	Deakin law Review
Dig US Practice Int'l L	Digest of United States Practice in International Law
DLR	Dominion Law Reports
Doc	Document

DPL Rev	DePaul Law Review
Duke JICL	Duke Journal of International and Comparative Law
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
EHRL Rev	European Human Rights Law Review
EJIL	European Journal of International Law
Ess HR Rev	Essex Human Rights Review
ETS	European Treaty Series
EU	European Union
Eur J Crim Policy Res	European Journal on Criminal Policy and Research
Eur Sc J	European Scientific Journal
EWHC	High Court of Justice (of England and Wales)
FICHL	Forum for International Criminal and Humanitarian Law
Fordham ILJ	Fordham International Law Journal
F Supp	Federal Supplement
GA / UNGA	United Nations General Assembly
GAOR	General Assembly Ordinary Resolution (United Nations)
German LJ / GLJ	German Law Journal
GWILR	George Washington International Law Review
GWU	George Washington University
Hague JJ	Hague Justice Journal
Harvard ILJ	Harvard International Law Journal

HR	Hague Recuels
HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly
HTR	Harvard Theological Review
IAC	International Action Centre
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICD	International Crime Database
ICEP Sri Lanka	International Crimes Evidence Project Sri Lanka
ICJ	International Court of Justice
ICJ Reps	International Court of Justice Reports
ICLQ	International and Comparative Law Quarterly
ICLR	International Criminal Law Review
ICRC	International Committee of the Red Cross
ICT	International Crimes Tribunal (Bangladesh)
ICTJ	International Centre for Transnational Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICT-BD	International Crimes Tribunal in Bangladesh
IDF	Israeli Defence Forces
IFHR	International Federation of Human Rights
IHT	Iraqi Higher Tribunal
IJCST	International Journal of Criminology and Sociological Theory

IJRL	International Journal of Refugee Law
IJRLTJHR	International Journal of Rule of Law, Transnational Justice and Human Rights
IJSL	International Journal of the Semantics of Law
ILM	International Legal Materials
ILR	International Law Reports
IMT	International Military Tribunal (Nuremberg)
Institut MEDEA	European Institute for Research on Mediterranean and Euro-Arab Cooperation
IPEDR	International Proceedings of Economics, Development and Research
Irish Reps	Irish Reports
IRRC	International Review of the Red Cross
IRV	International Review of Victimology
ISS	International Security Studies
IST	Iraqi Special Tribunal
IT	International [Criminal] Tribunal
Italy YB Int'l L	Italy Year Book of International Law
IULJ	Igbinedion University Law Journal
JAL	Journal of African Law
JCR	Journal of Conflict Resolution
JGR	Journal of Genocide Research
JIBL	Journal of International Business Law
JICJ	Journal of International Criminal Justice
JILIR	Journal of International Law and International Relations

JLCS	Journal of Law and Comparative Studies
JLD	Journal of Law and Development
JLPG	Journal of Law, Policy and Globalization
JNAH	Journal of Northeast Asian History
JPL	Journal of Politics and Law
JSPL	Journal of South Pacific Law
JWH	Journal of World History
KB	King's Bench
KULRB	Kyushu University Legal Research Bulletin
LEG	Legal
LFN	Laws of the Federation of Nigeria
LJ	Lord Justice
LJIL/Leiden JIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
LRTWC	Law Reports of Trials of War Criminals
Md J Int'l L	Maryland Journal of International Law
Mediterranean JSS	Mediterranean Journal of Social Sciences
Melbourne JIL	Melbourne Journal of International Law
MEQ	Middle East Quarterly
Michigan ILJ	Michigan International Law Journal
National Taiwan Univ L Rev	National Taiwan University Law Review
NATO	North Atlantic Treaty Organization
NDJICHL	Notre Dame Journal of International, Comparative, and Human Rights Law

NGO	Non-Governmental Organization
NILR	Netherlands International law Review
NJR	Nigerian Juridical Review
NJIHR/Northwestern JIHR	Northwestern Journal of International Human Rights
Northern University JL	Northern University Journal of Law
Northwestern University JL	Northwestern University Journal of Law
NWLR	Nigeria Weekly Law Reports
NYILR	New York International Law Review
OAS	Organization of American States
OASTS	Organization of American States Treaty Series
OAU	Organisation of African Unity
Ottawa L Rev	Ottawa Law Review
OHCHR	Office of the High Commissioner for Human Rights (UN)
Oxford JLS	Oxford Journal of Legal Studies
PCIJ	Permanent Court of International Justice
PD	Probate Division
PISM	Polski Spraw Miedzynarodowych (Polish Institute of International Affairs)
PROT	Protocol
Pub L	Public Law
PWHCE	Perspectives on World History and Current Events
QB	Queen's Bench
QBD	Queen's Bench Division

RC	Review Conference (on the Rome Statute of the International Criminal Court)
REG	Regulation
RES/Res	Resolution
RGSL	Riga Graduate School of Law
RQDI	Revue Quebecoise de Droit International
RSC	Revised Statutes of Canada
SC (UNSC)	United Nations Security Council
SCR	Supreme Court Reports
SCSL	Special Court for Sierra Leone
SDNY	Southern District of New York
SSJ	Studies in Social Justice
Stat	Statute
STL	Special Tribunal for Lebanon
SP	Supplementary Protocol
Supp	Supplement/Supplementary
SYBIL	Singapore Year Book of International Law
Temple ICLJ	Temple International and Comparative Law
TFFWA	The Fletcher Forum of World Affairs
TIAS	Treaties and Other International Acts Series
TILJ	Texas International Law Journal
TWL	Third World Quarterly
UCDLR	University College Dublin Law Review
UCLA	University of California, Los Angeles

UERJ-RFD	Revista da Faculdade de Direito da Universidade do Estado do Rio de Janeiro
UKHL	United Kingdom House of Lords
UKL	United Kingdom Legislation
UN	United Nations
UNGA	United Nations General Assembly Resolution
UNMIK	United Nations Interim Administration Mission in Kosovo
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
UNYB	United Nations Yearbook
U Pa J Int'l L	University of Pennsylvania Journal of International Law
US/USA	United States of America
USAK	Uluslararası Stratejik Arastirmalar Kurumu
USAK YIPL	USAK Yearbook of International Politics and Law
USSR	Union of Soviet Socialist Republics
UULJ	University of Uyo Law Journal
Vanderbilt JIL	Vanderbilt Journal of Transnational Law
VOA	Voice of America
Wash U Glob Stud Rev	Washington University Global Studies law Review
Washington University LQ	Washington University Law Quarterly
Wisconsin ILJ	Wisconsin International Law journal
WLR	Weekly Law Reports
WPJ	World Policy Journal
WUJR	Washington University Jurisprudence Review

YIHL	Yearbook of International Humanitarian Law
YILC	Yearbook of the International Law Commission
YJIL	Yale Journal of International Law
YNZJ	Yearbook of New Zealand Jurisprudence

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CHAPTER 1

INTRODUCTION

1.1 Background Information

As a branch of international law, international criminal law and the international criminal justice system have developed principally to prohibit and punish the commission of certain acts considered so heinous as to amount to serious crimes against the international community.¹ These crimes include genocide, war crimes, crimes against humanity, and the crime of aggression. Another mission of this branch of international law is to provide substantial justice to victims of these crimes (mostly human beings) and also to protect these victims and national/international societies from the scourge of the crimes.² An important goal from the earliest beginning of the system has been to obviate the situation where state officials who deliberately commit these crimes would escape liability by arguing that they acted as agents of their state and that the state should, therefore, bear sole legal (state) responsibility for all their acts.³

Despite the centrality of these goals, one of the challenges for the system is the application of the rule of state immunity.⁴ By virtue of this rule, a sovereign state is immune (shielded) from civil and criminal judicial processes abroad in other states. Thus, it cannot be sued in the courts or other judicial tribunals of another state without its (the former state's)

¹ See, e.g., Currie, Robert J & Joseph Rikhof, *International and Transnational Criminal Law*, 2nd ed (Toronto: Irwin Law Inc, 2013) at 4-13.

² Damaska, Mirjan R, "What is the Point of International Criminal Justice" (2008) 83:1 Chicago-Kent L Rev 329 at 331-340.

³ Ibid at 331-333.

⁴ Wuerth, Ingrid, "International Law in Domestic Courts and the Jurisdictional Immunities of the State Case" (2012) 13 Melbourne JIL 1; Foakes, Joanne, "Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts", Chatham House Briefing Paper, International Law Programme, November 2011, IL BP 2011/02; Akande, Dapo & Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (2011) 21:4 EJIL 815; Bankas, Ernest K, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Berlin: Springer, 2005).

consent.⁵ One basic rationale for the evolution of this rule of state immunity is respect for the concept of the sovereign equality of states.⁶ By virtue of this concept, all sovereign states are deemed legally equal in status, irrespective of variations in geographical size, military might, and economic prowess. This rationale is aptly expressed in the Latin maxim: “*par in parem non habet imperium*” (an equal has no authority over an equal).⁷ Another rationale is the need for non-interference with the smooth governance of states.⁸

However, these abstract entities called sovereign states cannot exercise their rights and observe their obligations on their own. They must function through the instrumentality of natural persons (individuals) who are their heads of state and/or government. State immunity protection extends to these heads of state and/or government and to some other high-ranking officials appointed to administer the state’s official/public powers, e.g., foreign, defence, and other senior cabinet ministers/secretaries.⁹ It can also extend to lower officials who act as state agents.¹⁰ In *Chuidian v Philippine National Bank*¹¹, the US Federal Court held that “it is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly.”

⁵ See *The Schooner Exchange v McFaddon* 7 Cranch 116 (1812) (“*Schooner Exchange* case”). See also Tomuschat, Christian, “*The International Law of State Immunity and Its Development by National Institutions*” (2011) 44 Vanderbilt JTL 1105 at 1116-1127; Talmon, Stefan, “*Hague International Tribunals: International Court of Justice: Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished*” (2012) 25:04 LJIL 979 at 979-981.

⁶ *Charter of the United Nations*, 1945, 1 UNTS XVI (“*UN Charter*”), art 2(1).

⁷ Schaack, Beth Van, “*Par In Parem Imperium Non Habet: Complementarity and the Crime of Aggression*” (2012) 10:1 JICJ 133 at 149; Yang, Xiadong, *State Immunity in International Law* (Cambridge: Cambridge University Press, 2012) at 51; Trahan, Jennifer, “*Is Complementarity the Right Approach for the International Criminal Court’s Crime of Aggression? Considering the Problem of “Overzealous” National Court Prosecutions*” (2013) 45 Cornell Int’l LJ 569 at 587-588.

⁸ These and such other rationales as the fundamental right rationale and the practical courtesy (“comity”) rationale, are discussed in Chapter 2.

⁹ Murphy, Sean D, “*Immunity Ratione Personae of Foreign Government Officials and Other Topics: The Sixty-Fifth Session of the International Law Commission*”, GWU Law School Public Law Research Paper No. 2013-125; GWU Legal Studies Research Paper No. 2013-125.

¹⁰ This is distinct from diplomatic immunity which the thesis does not deal with.

¹¹ 912 F 2d 1095 (9th Cir. 1990) at 1101. See also *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611 at 669.

The UK Court of Appeal (per Diplock, LJ) had, much earlier, clearly emphasized this position in *Zoernsch v Waldock*¹² in the following words:

A foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf. To sue an envoy in respect of acts done in his official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be ‘*en poste*’ at the date of his suit.

Consequently, these high-ranking state officials and other state agents cannot be sued, arrested, prosecuted, or subjected to other foreign judicial proceedings for their unlawful acts, including (at least, in principle) the heinous international crimes noted above. This is so, whether these officials committed the alleged crimes within the territory of their home state or within a foreign state’s territory, against their home state’s nationals or foreigners, or against a foreign state’s governmental apparatuses and other vested interests. This is because these officials are deemed the alter ego of their home state in the exercise of that state’s public/official powers, in the course of which their alleged unlawful acts are committed.¹³ This state immunity rule originated in customary international law.¹⁴ It has also been codified under some multilateral international treaties¹⁵ and municipal statutes of some states.¹⁶

¹² [1964] 1 WLR 675, at 692, per Diplock, LJ.

¹³ See *Jurisdictional Immunities of the State Case (Germany v Italy: Greece intervening)* (2012) ICJ Reps 99 (“*ICJ Jurisdictional Immunities Case*”).

¹⁴ *The Schooner Exchange* case, *supra*, note 5.

¹⁵ E.g., the *European Convention on State Immunity*, 1972, 1 ETS 74; 1495 UNTS 181; *UN Convention on Jurisdictional Immunities of States and Their Property*, 2004, UN Doc A/59/508 (“*UN Jurisdictional Immunities Convention*”).

¹⁶ US’ *Foreign Sovereign Immunities Act*, 1976, Pub L No 94-583, 90 Stat 2891 (1976); (1976) 15 ILM 1388; UK’s *State Immunity Act*, (1978) 17 ILM 1123; Singapore’s *State Immunity Act*, 1979, as amended, online: <<http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=DocId%3A%221be1a8f7-0968-4fcc-ac26-39d3a51b7b70%22%20Status%3Ainforce%20Depth%3A0;rec=0>>; Pakistan’s *State Immunity Ordinance, No VI*, 1981, reproduced in Dickinson, Andrew et al (eds), *State Immunity: Selected Materials and Commentary* (Oxford: Oxford University Press, 2004) 496 ; South Africa’s *Foreign States Immunities Act* 87, 1981, as amended by *Foreign States Immunities Amendment Act* 48, 1985, also as amended by *Foreign States Immunities Amendment Act* 5, 1988, online: <<http://www.dfa.gov.za/chiefstatelawadviser/documents/acts/foreignstatesimmunitiesact.pdf>>; Canada’s *State Immunity Act*, RSC 1982, c S-18; (1982) 21 ILM 798 ; and, Australia’s *Foreign States Immunities Act*, 1985, (1986) 25 ILM 715.

1.2 Statement of Research Problems

Though the original rationales for the evolution of the state immunity rule may be commendable, application of the rule in the international criminal justice system does more harm than good to international society. Today, the rule unduly shields high-ranking state officials from individual accountability for international crimes committed in both peacetime and armed conflict situations. This is so, notwithstanding that international law deems perpetrators of these crimes “*hostis humani generis*” (enemies of all humankind)¹⁷ and imposes on all states an obligation “*erga omnes*” (owed to the whole world)¹⁸ to bring them to justice, because the crimes offend the values of the international community.

In *R v Bow Street Metropolitan Stipendiary Magistrate & Ors, ex parte Pinochet Ugarte (No. 3)*¹⁹ (the “*Pinochet case*”), the UK House of Lords, while trying to disregard the immunity of a former head of state, held that a serving head of state is still protected by state immunity even in respect of serious international crimes like torture and crimes against humanity. Also, in the *Case Concerning the Arrest Warrant of 11 April, 2000 (Democratic Republic of Congo v. Belgium)*²⁰ (the “*ICJ Arrest Warrant Case*”), the International Court of Justice (ICJ) held that an incumbent foreign minister enjoys immunity from foreign criminal prosecution, even for torture, war crimes and crimes against humanity.²¹ Recently, the General Prosecutor of Paris, France dismissed, on grounds of state immunity, legal proceedings commenced against Donald Rumsfeld (a former US Defence Secretary) for war crimes and for torture on Iraqi prisoners at

¹⁷ Greene, Jody, “*Hostis Humani Generis*” (2008) 34: Critical Inquiry 683; Werkmeister, Andreas, “*International Criminal Law as a Means to Fight the ‘Hostes humani Generis’? – On the Dangers of the Concept of Enemy Criminal Law*” (2013) 3 KULRB 1.

¹⁸ De Hoogh, Andre, *Obligations Erga Omnes and International Crimes: A Theoretical inquiry into the Implementation and Enforcement of the International Responsibility of States* (The Hague: Kluwer Law Int’l, 1996) at 91-95. See also Tams, Christian J, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2010).

¹⁹ (2000) 1 AC 147.

²⁰ (2002) ICJ Reps 3.

²¹ See also Akande & Shah, op cit, note 4 at 819-820, footnotes 15-17.

the Abu Ghraib Jail in Iraq and prisoners at the US detention facility in Guantanamo Bay, Cuba.²² Other examples of such dismissals on grounds of state immunity include: *Re Gaddafi*²³ before the French Cour de Cassation; *Re Sharon & Yaron*²⁴ before the Belgian Cour de Cassation; and, *Re Mugabe*²⁵ before the English High Court.²⁶

Consequent upon the protection accorded by this rule, the high-ranking officials who benefit from it abuse the rule with such impunity that its continued observance in the international criminal justice system poses a potential conflict with some peremptory norms of general international law or “*jus cogens*”.²⁷ Among these *jus cogens* norms are the prohibitions on the commission of the above-stated and other forms of international crimes, and the ban on the violation of other states’ territorial integrity and political independence, i.e., breach of international peace and security.²⁸

Today, high-ranking officials of one state could deliberately violate the sovereignty of another state through such aggressive acts as unwarranted wars and still plead state immunity as a bar to criminal proceedings against them for these acts.²⁹

²² Centre for Constitutional Rights, “*French War Crimes Complaint Against Donald Rumsfeld, et al.*”, online: <<http://ccrjustice.org/ourcases/current-cases/french-war-crimes-complaint-against-donald-rumsfeld,-et-al.>>; Dobbie, A et al (eds), “*French Prosecutors Throw out Rumsfeld’s Torture Case*”, online: <<http://www.reuters.com/article/Politics News/idUSL2381695200071123>>.

²³ Arrêt no. 1414, (2001) 125 ILR 456.

²⁴ (2003) 42 ILM 596.

²⁵ Reported in Warbrick, Collin, “*Public International Law: I. Immunity and International Crimes in English Law*” (2004) 53:3 ICLQ 769.

²⁶ See also Akande & Shah, op cit, note 4 at 819-820, footnotes 15-17.

²⁷ *Jus cogens* or a *peremptory norm of general international law* means a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. See the *Vienna Convention on the Law of Treaties*, 1969, 1155 UNTS 331, (1969) 8 ILM 679, art 53.

²⁸ *UN Charter*, supra, note 6, art 2(4).

²⁹ See, e.g., Sawma, Gabriel, “*Immunity of Heads of State under International Law*”, online: <<http://www.gabriel-sawma.blogspot.com>>.

Such impunity also encourages deliberate and indiscriminate violation of the municipal laws of one state by the officials of another state³⁰, and it can lead to deliberate and gross violation of other important norms of the international legal order. These other norms include, especially, human rights of individuals and groups protected under relevant international legal instruments.³¹

Furthermore, application of the state immunity rule creates inequality between high-ranking state officials and other individuals who are not in the category of high-ranking state officials as regards accountability for international crimes. These individuals have become sacrificial “scapegoats” who must bear full legal responsibility for their international crimes, while high-ranking state officials are treated as untouchable “sacred cows” who may never be held accountable for their own crimes.³² Consequently, the rule’s application defeats the notion of “equality before the law”, which is an essential component of the age-old doctrine of the “rule of law”³³ as codified in relevant international instruments.³⁴

The state immunity rule’s application in the international criminal justice system also leads to injustice, as victims of the international crimes committed by high-ranking state officials

³⁰ See Gardiner, Richard, *International Law* ((Harlow, Essex, England: Pearson Education Ltd, 2003) at 340.

³¹ E.g., the *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984, 1465 UNTS 85 (“*Torture Convention*”); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950, ETS 5; 213 UNTS 221; *American Convention on Human Rights*, 1969 1144 UNTS 123; *African Charter on Human and Peoples’ Rights*, 1981 OAU Doc. CAB/LEG/67/3 rev. 5; (1982) 21 ILM 58.

³² See, e.g., *Re Sharon & Yaron*, supra, note 24. In this case, while the immunity rule shielded the 1st Defendant who was a high-ranking state official, there was no similar shield for the 2nd Defendant who did not qualify as such official. Also, while the accused persons were exempted from foreign trial in *Re Gaddafi*, supra, note 23 and *Re Mugabe*, supra, note 25, the defendant in *R v Munyaneza*, 2009 QCCS 2201 (an ordinary Rwandan citizen) was tried and fully punished before the Canadian court for genocide committed in Rwanda.

³³ See Lautenbach, Geranne, *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford: Oxford University Press, 2013) at 46; Merkel, Wolfgang, “*Measuring the Quality of Rule of Law: Virtues, Perils, Results*”, in Zurn, Michael et al (eds), *Rule of Law Dynamics: In an Era of International and Transnational Governance* (New York: Cambridge University Press, 2012) 28 at 40; Silkenat, James R et al (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Neu-Isenburg, Germany: 2014).

³⁴ E.g., the *Universal Declaration of Human Rights*, 1948, UNGA Res 217A(III), UN GAOR, 3d Sess, UN Doc A/810 (of 10 December 1948), arts 1 & 7; *International Covenant on Civil and Political Rights*, 1966, 999 UNTS 171 (ICCPR), art 14.

are denied justice, because the state officials who commit the crimes against them are unduly shielded from prosecution by the rule of state immunity.³⁵

The application of the rule also leads to many other social, political, and economic problems other than the aforementioned. One of these problems is political self-perpetuation. Culpable state officials know that stepping out of political power means losing state immunity protection, while remaining in power implies perpetual protection by immunity from judicial scrutiny of their international crimes. As such, they often devise means, fair or foul, to hang on to political power. Typical examples are Augusto Pinochet's self-conferred "*Senator-for-life*" status in Chile with perpetual immunity from criminal prosecution, and Robert Mugabe's unending presidency in Zimbabwe.³⁶

In view of the foregoing, it will be argued here that application of the state immunity rule in the international criminal justice system substantially undermines one of the principal purposes of the United Nations. This purpose is: "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedom for all without discrimination..."³⁷

In order to overcome the foregoing and other problems and ensure compliance with international criminal law norms, the international community has adopted some legal response mechanisms. These mechanisms entail adoption of legal instruments that create certain international or hybrid criminal tribunals and/or, expressly or impliedly, abolish state immunity

³⁵ See, e.g., Roht-Arriaza, Naomi, "*Punishment, Redress and Pardon: Theoretical and Psychological Approaches*", in Roht-Arriaza, Naomi (ed), *Impunity and Human Rights in International Law and Practice* (Oxford: Oxford University Press, 1995) 13 at 17-18.

³⁶ Power, Robert C, "*Pinochet and the Uncertain Globalization of Criminal Law*" (2007) 39:1 GWILR 89 at 127-133; Nzongola-Ntalaja, G, "*Democratic Transitions in Africa*" (2006) 1 The Constitution 1.

³⁷ *UN Charter*, supra, note 6, art 1(3).

in international criminal proceedings before these tribunals or before national courts.³⁸ These response mechanisms are described in this thesis as: the Old and New *Ad hoc* International Criminal Tribunal Mechanisms, the Universal Criminal Jurisdiction Mechanism, the Hybrid/Internationalized Criminal Tribunal Mechanism, and the Permanent International Criminal Court Mechanism.

However, these mechanisms have many weaknesses which essentially leave the problems of state immunity in place. For example, the geographical and temporal jurisdictions of the tribunals established under the ad hoc international and hybrid criminal tribunal mechanisms, respectively, are very limited. Thus, the tribunals cannot address many crimes committed by state officials outside these geographical and temporal frameworks.³⁹ These tribunals' substantive jurisdictions were never uniform. Some lack jurisdiction to try some crimes that others could try.⁴⁰ Similarly, essential elements of a particular crime may differ under the tribunals' respective legal instruments. Thus, an official may lose his or her immunity over a given international crime before one tribunal, while a counterpart appearing before another tribunal for the same act may not necessarily suffer the same fate.

³⁸ These instruments include the *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 1993, UN Doc S/RES/827 ("ICTY Statute"); *Statute of the International Criminal Tribunal for Rwanda*, 1994, UN Doc S/RES/955 ("ICTR Statute"); *Rome Statute of the International Criminal Court*, 1998, 2187 UNTS 90 ("Rome Statute" or "ICC Statute"); *Statute of the UN Special Court for Sierra Leone*, 2002, 2178 UNTS 138, 145 ("SCSL Statute"); *Statute of the Iraqi Special Tribunal*, 2003 (2004) 42 ILM 231 ("IST Statute"); *Statute of the Special Tribunal for Lebanon*, 2006, UN Doc S/RES/1757 ("STL Statute"); *Charter of the International Military Tribunal, Nuremberg*, 1945, 82 UNTS 279 ("Nuremberg Charter"); *Charter of the International Military Tribunal for the Far East*, 1946 ("Tokyo Charter"), annexed to *Special Proclamation, Establishment of an International Military Tribunal for the Far East*, 19 January 1946, TIAS No 1589; *Convention on the Prevention and Punishment of the Crime of Genocide*, 1948, 78 UNTS 277 ("Genocide Convention"); and, the *Torture Convention*, *supra*, note 31.

³⁹ See, e.g., the *ICTY Statute*, *supra*, note 38, art 8, and the *ICTR Statute*, *supra*, note 38, art 1.

⁴⁰ See *Nuremberg Charter*, *supra*, note 38, art 6(a); *Tokyo Charter*, *supra*, note 38, art 5(1); *ICTY Statute*, *supra*, note 38, art 4; and, *ICTR Statute*, *supra*, note 38, art 2.

These tribunals are often alleged to be administering “victor’s justice”, i.e., they are mostly post-conflict institutions set up by the victorious parties to punish the vanquished.⁴¹ Equally culpable high-ranking officials of the victorious parties are exempted from the jurisdictions of these tribunals, while their counterparts from the vanquished parties have their immunities removed and get tried and punished.⁴²

As for the universal criminal jurisdiction mechanism, there is some controversy as to the scopes and limits of its anti-state-immunity potential.⁴³ For the permanent international criminal court mechanism, the operation of the International Criminal Court (“ICC”) established pursuant to this mechanism and its efforts against state immunity have been so far selective. They have focused almost exclusively on state officials from one region of the world (Africa)⁴⁴, despite situations of commission of serious crimes under the ICC’s jurisdiction by state officials in other regions. In addition, the ICC’s enabling legal instrument contains provisions that undermine its efforts to disregard or abolish state immunity.

⁴¹ See Meernik, James, “Victors’ Justice or the Law?: Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia” (2003) 47:2 JCR 140. See also Tanaka, Yuki et al (eds), *Beyond Victors’ Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff, 2010); Waldorf, Lars, “A Mere Pretense of Justice: Complementarity, Sham Trials, and Victors’ Justice at the Rwanda Tribunal” (2011) 33:4 Fordham Int’l LJ 1221 at 1224-1229.

⁴² See, e.g., Wald, Patricia M, “Running the Trial of the Century: The Nuremberg Legacy” (2006) 27:4 Cardozo LR 1559 at 1560. See also *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, online: <<http://www.icty.org/sid/10052>>; IAC, “European Hearings on US NATO War Crimes Against Yugoslavia: Reports from Berlin, Rome, Paris, and Amsterdam”, online: <<http://www.iacenter.org/warcrime/eurowc99.htm>>. See also Fenrick, WJ, “Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia” (2001) 12 EJIL 489; Cohn, Marjorie, “NATO Bombing of Kosovo: Humanitarian Intervention or Crime Against Humanity” (2002) 15 IJSL 79; ICTY, “The Cases”, online: <<http://www.icty.org/action/cases/4>>; Cameron, Hazel, *Britain’s Hidden Role in the Rwandan Genocide: The Cat’s Paw* (New York: Routledge, 2013); Melvern, Linda R, *A People Betrayed: The Role of the West in Rwanda’s Genocide* (London: Zed Books, 2000); ICTR, “Status of Cases”, online: <<http://www.unicttr.org/cases/tabid/204/Default.aspx>>.

⁴³ See *Pinochet* case, supra, note 19; the *ICJ Arrest Warrant Case*, supra, note 20.

⁴⁴ See, e.g., Ezennia, Celestine Nchekwube, “The International Criminal Court System: An Impartial or a Selective Justice Regime?”, a research paper submitted to the Schulich School of Law, Dalhousie University, Halifax, Nova Scotia, Canada, April, 2014 at 20-37.

1.3 Research Questions

In the light of the foregoing, the present thesis examines the following questions:

- 1) What is the scope and effect of the state immunity rule with respect to international criminal law?
- 2) What is the usefulness of the state immunity rule to international criminal justice and the sovereign equality of states?
- 3) How does the continued application of the state immunity rule in the international criminal justice system ensure respect for other norms of international law, such as ensuring international peace and security and respect for human rights?
- 4) What are the merits and demerits of the international mechanisms of legal response to the problems of state immunity in the international criminal justice system and how could these mechanisms be improved to more effectively counter the adverse consequences of state immunity?
- 5) To what extent do the efforts to disregard state immunity in the international criminal justice system reflect the sovereign equality of all states?
- 6) To what extent does the anti-state-immunity efforts of the international criminal justice system ensure equal standard of justice for all individuals, states and regions of the world?
- 7) How can the current legal response mechanisms be used in order to ensure that developed states do not use them as post-colonial or racist agents against less developed states.

1.4 Description of Research Argument

The present thesis argues that application of the state immunity rule in the international criminal justice system leads to serious injustice and other problems. It also argues that existing international legal response mechanisms have not been able to sufficiently address these problems. It concludes that due to this situation, the problems sought to be overcome by these mechanisms significantly continue, a fact that calls for serious reforms of the mechanisms.

1.5 Research Scope

This thesis examines the problems arising from the application of the international law rule of state immunity in the international criminal justice system. It also analyses the operational successes of the various legal mechanisms so far adopted by the international community to overcome these problems. Furthermore, it examines the weaknesses of these mechanisms and suggests reforms by recommending that some of the mechanisms should be reformed in order to be more effective, while others should be scrapped outright.

Before doing these, it first traces the historical evolution of the state immunity rule and conducts an overview of some other general issues relating to the rule. The thesis does not deal with state immunity in civil proceedings, although some issues relevant to this area of state immunity are addressed in the general overview mentioned above. Also, the thesis does not treat diplomatic immunity or the immunity of international organization.

1.6 Research Methodologies

A combination of research methodologies is employed in producing this thesis. First, a *doctrinal research methodology*⁴⁵ is adopted. In this regard, relevant provisions of pertinent international instruments⁴⁶ and municipal statutes⁴⁷, as well as material decisions of relevant international and national judicial tribunals are appraised. The aim of using this methodology is twofold. The first is to show how far the provisions of some of these instruments and their judicial interpretations have contributed to the aforementioned problems generated by the application of the state immunity rule. The second is to show the extent to which the provisions of the other instruments and the ratios of the other judicial decisions are disposed to disregarding state immunity in appropriate cases and holding state officials accountable for their international crimes high-ranking state officials who commit international crimes.

Also, this thesis adopts the postulations of different legal theories. First is the *natural law theory*. This theory maintains that law gains its authority or legitimacy, and at least some of its content, from certain immutable principles that are inherent in nature and morality and/or reason (whether by virtue of God or not).⁴⁸ Along these lines, the thesis maintains that the inherent

⁴⁵ See Hutchinson, Terry & Nigel Duncan, “*Defining and Describing What We Do: Doctrinal Legal Research*” (2012) 17:1 Deakin L Rev 83.

⁴⁶ These instruments include the *European Convention on State Immunity*, supra, note 15; the *UN Jurisdictional Immunities Convention*, supra, note 15; *Treaty of Versailles*, 1919, 7 LNTS 332; the *Nuremberg Charter*, supra, note 38; the *Tokyo Charter*, supra, note 38; the *Genocide Convention*, supra, note 38; the *ICTY Statute*, supra, note 38; the *ICTR Statute*, supra, note 38; the *Rome Statute*, supra, note 38; the *SCSL Statute*, supra, note 38; the *IST Statute*, supra, note 38; and, *Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (East Timor)*, 2000, UNTAET/REG/2000/15.

⁴⁷ These include US’ *Foreign Sovereign Immunities Act*, supra, note 16 ; UK’s *State Immunity Act*, supra, note 16; *American Servicemembers’ Protection Act*, 2002, Pub L No 107-206, 116 Stat 820 (2002); *International Crimes (Tribunals) Act*, 1973, as amended, online: <http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=435> (Bangladesh); *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia*, 2004, NS/RKM/1004/006 (Cambodia); *Iraqi Higher Criminal Court Law*, 2005, No (10), online: <http://www.law.case.edu/sadamtrial/documents/IST_statute_official_english.pdf> (Iraq); and, *Nazis and Nazi Collaborators (Punishment) Law*, No 5710, 1950, online: <<http://mfa.gov.il/MFA/MFA-Archive/1950-1959/Pages/Nazis%20and%20Nazi%20Collaborators%20-Punishment-%20Law-%20571.aspx>> (Israel).

⁴⁸ Cryer, Robert et al, *Research Methodologies in EU and International Law* (Portland, USA: Hart Publishing, 2011) at 35-37.

dignity and equality of human beings demand that all natural persons who commit international crimes should be brought to justice without distinction as to political status. Thus, the thesis argues against the discrimination which the state immunity rule engenders between state officials, on the one hand, and ordinary individuals, on the other hand, as regards international criminal accountability. It also argues that human victims of international crimes are the same the world over and should be entitled to equality of justice, whether the crimes against them were committed by ordinary persons or by state officials.

This natural law theory is also employed in the critique of the existing anti-state-immunity response mechanisms. Here, the thesis argues that on the basis of the sovereign equality of all states, the current disregard/abolition of state immunity in the international criminal justice system should apply to culpable state officials in all states and regions of the world equally and without any exemption. Since the sovereign equality of all states presupposes the equality of all states' officials (who are also equal individuals), culpable officials of some states should not be stripped of their immunity, while their counterparts in other states are not so treated. Thus, there should be no selectivity or double standard. More so, since the international criminal justice system is meant to protect all human beings and societies without discrimination, and since the pains of international crimes are the same in all victims, notwithstanding the particular state whose officials have committed the crimes or where they are committed.

The thesis also employs the *postcolonial theory*, which is particularly interested in a critique of current international legal arrangements from the perspective that they reflect and maintain colonial relations and are complicit in subordinating or silencing peoples and states from the so-called "Global South" and "third world".⁴⁹ To this end, the thesis argues that the current efforts at disregarding/abolishing state immunity in the international criminal justice

⁴⁹ Ibid at 69-71.

system are lopsided. They are made in such a way as to target officials of the developing states. This practice gives the erroneous impression that officials of these developing states are the only political leadership-level violators of international criminal law norms, while their counterparts in the “northern/western” hemisphere and the developed world are all innocent.

In addition, elements of the *critical race theory* (CRT) run through some parts of the thesis that deal with critique of the current response mechanisms. CRT maintains that racism is engrained in the system of the international society, and that international law and power structures are based on white privilege and white supremacy, which perpetuate the marginalization of people of colour.⁵⁰ Accordingly, the thesis maintains that the fact that all the state officials so far stripped of immunity by the ICC are black African officials from African states at least raises a question as to whether the ICC has become an instrument of racist oppression against black African people and states.

Finally, the *idealist approach* also influences the present research. The *idealism theory* maintains that ideas form and create systems and that the current international legal system (including the state immunity rule) is founded on a state-based set of ideas which prevent the system from better serving the interests of humanity as a whole. For this theory, since ideas are the foundations of all social structures, to change ideas about how such structures ought to be arranged will inevitably lead to changes in those structures.⁵¹ In tune with this theory, this thesis advances the position that the state immunity rule was created to uphold the old and controversial idea that international law was invented for sovereign states only and not for individuals. The thesis further shows that in view of the human protection and individual

⁵⁰ UCLA School of Public Affairs / Critical Race Studies, “*What is Critical Race Theory*”, online: <<http://spacrs.wordpress.com/what-is-critical-race-theory/>>; Delgado, Richard & Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2011) at 6-9.

⁵¹ Cryer et al, op cit, note 48 at 57-58.

accountability missions of the international criminal justice system, coupled with state immunity's numerous problems, this idea of the state as the sole actor is ripe for change.

1.7 Chapter Breakdown

This thesis is made up of six chapters. Chapter 1 is titled "Introduction" and deals with such preliminary issues as background information and statement of research problems. These two sub-segments, put together, attempt to summarize the thematic preoccupation of this thesis. They do this by providing a brief overview on the state immunity rule, the problems arising from its application in the international criminal justice system, and the successes and failures of the legal mechanisms adopted by the international community to respond to these problems. The chapter also contains the research questions raised by the thesis, as well as the research argument. The research argument is to the effect that application of the rule in the international criminal justice system results in serious injustice and significant social, political, economic, and allied problems which existing international legal response mechanisms are not able to solve, a situation that calls for reforms. It further highlights the research aims and objectives of the thesis, the research scope, and the various research methodologies employed in writing the thesis.

Chapter 2 traces the historical evolution of the state immunity rule in international law by examining different sources advanced by academics and judges as the origins of the rule. These sources include the personal equality of sovereign heads of state, the old English feudal system, the principle of non-interference in the domestic affairs of states, and the consensus of a great majority of states. The chapter observes that despite the arguments as to the origin of the rule, it has become an established and functional rule of international law. This chapter also performs a general overview of various issues related to the rule, such as an exposition of its meaning and

essence, an examination of the absolute and restrictive theories⁵² of the rule, and an analysis of the entities protected by the rule. These entities range from the state itself to high-ranking state officials like heads of state, heads of government, and foreign ministers. Besides, it discusses the types of immunity available to foreign high-ranking state officials before the municipal courts of the forum state, i.e., immunity *ratione personae* and immunity *ratione materiae*, respectively. In addition, the chapter assesses the arguments on whether state immunity operates as a substantive defence or a procedural bar, and it supports the latter view. Again, it reviews the various rationales put up in support of the state immunity rule in international law. These range from the symbolic sovereignty and non-intervention rationale to the fundamental state right rationale, the practical courtesy (comity) rationale, and to the functional necessity rationale. Finally, the chapter discusses waiver of immunity.

Chapter 3 unfolds numerous problems generated by the application of the state immunity rule in the international criminal justice system. It shows that despite the commendable rationales for the rule and its usefulness in preserving the sovereign equality of states and ensuring non-interruption of their smooth governance, high-ranking officials protected by the rule grossly abuse it. Consequently its application in the international criminal justice system causes a lot of problems that essentially undermine the individual criminal accountability and justice administration missions of the system, and, therefore, requires some reconsideration. These problems include impunity for violation of peremptory norms of international law, such as the prohibitions on the commission of heinous international crimes like genocide, war crimes, torture, crimes against humanity and the crime of aggression. Others are systematic violation of internationally protected human rights and indiscriminate violation of the municipal laws of

⁵² The distinctions between these two theories apply more prominently in civil cases, which are not the concern of this thesis.

other states, perpetuation of injustice to victims of international crimes committed by state officials, and contradiction of the concept of equality before the law by discriminating between state officials and ordinary individuals regarding accountability for international crimes. Yet another problem discussed in the chapter is the fact that the state immunity rule indirectly leads to the habit of political self-perpetuation among some high-ranking state officials.

The contributions of the various mechanisms of legal response which the international community has adopted in order to overcome these problems are discussed in Chapter 4. These mechanisms, as described in the thesis, include the old *ad hoc* international criminal tribunal mechanism and the new *ad hoc* international criminal tribunal mechanism, respectively. Under these two mechanisms, the legal regimes of the following *ad hoc* international criminal tribunals examined: the International Military Tribunal at Nuremberg (the “Nuremberg Tribunal”), the International Military Tribunal for the Far East (the “Tokyo Tribunal”), the International Criminal Tribunal for the former Yugoslavia (the “ICTY”), and the International Criminal Tribunal for Rwanda (the “ICTR”). Another mechanism is the hybrid criminal tribunal mechanism. The tribunals whose legal regimes are appraised under this include the UN Special Court for Sierra Leone, the Iraqi Special Tribunal/ Iraqi Higher Criminal Court, and the Extraordinary Chambers in the Courts of Cambodia. Furthermore, the chapter examines the permanent international criminal court mechanism represented by the current International Criminal Court (the “ICC”).

One major achievement of the foregoing mechanisms, as shown by the chapter, is that the enabling legal instruments of all the relevant tribunals/courts expressly abolish the immunity rule in international criminal proceedings before the tribunals/courts. Consequently, many high-ranking state officials who would have otherwise been shielded by the state immunity rule have

been deservedly tried and punished by the foregoing tribunals for their international crimes. Others have been indicted or are undergoing trials, especially before the ICC.

In addition, the chapter treats the universal criminal jurisdiction mechanism under which customary international law and, to some extent international treaties, confer jurisdiction on the national courts of all states or all states parties, as the case may be, to try and punish any person who commits any one of certain heinous international crimes. This jurisdiction may be exercised, despite the perpetrator's nationality or official status, place of commission of the crime, or absence of any other jurisdictional connection with the forum state. It is conferred on the ground that the affected crimes (e.g., genocide, war crimes, torture, crimes against humanity, and the crime of aggression) have attained the status of *jus cogens* and every state, therefore, has an obligation *erga omnes* to bring the perpetrators to justice.

Chapter 5 examines the weaknesses that render these mechanisms ineffective to overcome the problems referred to in Chapter 3. The peculiar weaknesses of each of the mechanisms are discussed. In addition to these, some general weaknesses that are common to all the mechanisms are addressed. These include the fact that the efforts at the disregard/abolition of state immunity in the international criminal justice system are currently lopsided against the developing states, while no significant action is taken against culpable officials of the developed states, a situation that promotes the "North-South" divide in contemporary international relations and politics. On the whole, the chapter concludes that all these weaknesses substantially undermine the efforts and enable many state officials who commit international crimes to still escape justice.

Chapter 6 concludes the thesis and makes some findings. It maintains that although the state immunity rule is a useful tool in the maintenance of sovereign equality and mutual respect

among states, its application in the international criminal justice system defeats the principal aims of the system and leads to many social and allied problems. It finds that due to several peculiar and general weaknesses, all the legal mechanisms adopted by the international community to respond to these problems are not effective enough to achieve their goals, and thus, high-ranking state officials still escape individual accountability for international crimes. On this basis, the thesis suggests some reforms. These include the repeal of *article 98* of the *Rome Statute* that encourages the powerful states to conclude BIAs that shield their officials from the ICC's jurisdiction, and the repeal of the provisions of the *Rome Statute* that vest in a state party the discretion to reject or defer the commencement of the ICC's jurisdiction over certain international crimes committed by its nationals or on its territory.⁵³ They also include creation of permanent and jurisdictionally harmonized regional and sub-regional international criminal tribunals⁵⁴ in place of the *ad hoc* international and hybrid criminal tribunals, and conferment of universal jurisdiction on the ICC over all crimes under the *Rome Statute*.

⁵³ E.g., the *Rome Statute*, *supra*, note 38, art 124.

⁵⁴ These tribunals should be similar to the regional and sub-regional courts operating under the international human rights law, e.g., the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court of Human and Peoples' Rights, and the Court of Justice of the Economic Community of West African States.

CHAPTER 2

STATE IMMUNITY IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT AND GENERAL OVERVIEW

2.1 Introduction

In international law, every sovereign state has, as one of its principal attributes, the jurisdiction (power) to affect people, property and circumstances within its territory by its municipal law. This is called ‘state jurisdiction’. It reflects the basic international law principles of state sovereignty, equality of states and non-interference in the internal affairs of each state.¹

In the words of David Harris:

State jurisdiction is the power of a state under international law to govern persons and property by its municipal law. It includes both the power to prescribe rules (prescriptive jurisdiction) and the power to enforce them (enforcement jurisdiction). The latter includes both executive and adjudicative powers of enforcement. Jurisdiction may be concurrent with the jurisdiction of other states or it may be exclusive. It may be civil or criminal. The rules of state jurisdiction identify the persons and the property within the permissible range of a state’s law and its procedures for enforcing that law. They are not concerned with the content of a state’s law except in so far as it purports to subject a person to it or to prescribe procedures to enforce it...²

This definition naturally leads to the division of the concept of state jurisdiction into legislative jurisdiction, executive jurisdiction and, judicial jurisdiction, along the lines of the three recognized organs of the government of each sovereign state (the legislature, the executive and, the judiciary).³

¹ Bowett, DW, “*Jurisdiction: Changing Problems of Authority over Activities and Resources*” (1982) BYIL 1; Akehurst M, “*Jurisdiction in International Law*” (1972-3) 46 BYIL 145; Ryngaert, Cedric, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2008). See also the *Montevideo Convention on the Rights and Duties of States*, 1933, 165 LNTS 19; 49 Stat 3097, art 1; the *United Nations Charter*, 1945, 1 UNTS XVI (“*UN Charter*”), art 2(1).

² Harris, David J, *Cases and Materials on International Law, 1st South Asian ed* (London: Thomson Reuters, 2011) at 227.

³ Shaw, Malcolm N, *International Law, 6th ed* (Cambridge: Cambridge University Press, 2008) at 645-646.

This thesis concerns state immunity from judicial jurisdiction. Judicial jurisdiction is concerned with the power of the courts and other judicial tribunals of a particular state to try cases involving a foreign element and hand down judgments binding upon the parties thereto.⁴ In turn, the courts of a state may claim to exercise this power on the basis of the heads of legislative jurisdiction recognized in international law. In criminal matters, these grounds may range from: the territorial principle (determining jurisdiction by reference to the place where the crime is committed); the nationality principle (determining jurisdiction by reference to the nationality or national character of the person committing the crime); and, the protective principle (determining jurisdiction by reference to the national interest injured by the crime). Other grounds are: the universality principle (determining jurisdiction by reference to the nature of the crime and the custody of the person committing it); and, the passive personality principle (determining jurisdiction by reference to the nationality or national character of the person injured by the crime).⁵

As established as this concept of state jurisdiction is in international law, the state immunity rule (already described in Chapter One) operates parallel to it.⁶ According to one commentator, it follows from the rule of state immunity that since each sovereign state is, in international law, deemed equal to every other sovereign state, no one state, its government or – important for present purposes - its officials can be expected to submit to the courts and verdicts of another.⁷

⁴ Ibid at 651.

⁵ Harris, David J, op cit, note 2 at 228-229. See also Currie, Robert J & Joseph Rikhof, *International & Transnational Criminal Law* (Toronto: Irwin Law Inc, 2013) at 61-84.

⁶ See, e.g., Wuerth, Ingrid, “*International Law in Domestic Courts and the Jurisdictional Immunities of the State Case*” (2012) 13 Melbourne JIL 1 at 1.

⁷ Abegunde, Babalola, “*Recasting Sovereignty and Federalism: The Way Forward in the Nigerian Political and Constitutional Quagmire*” (2007) 4:1 JLD 21.

2.2 Meaning of State Immunity

From the outset, it is essential to define the terms “*immunity*” and “*state immunity*”, respectively. Regrettably, none of the multilateral treaties and municipal statutes on the subject-matter of state immunity⁸ has an express definition of any of these terms. They only provide clues to the terms’ meanings in the contexts of the acts deemed immune or non-immune under the respective instruments. Thus, this thesis shall have regard to the dictionary meanings of the terms and to academic and judicial comments on them.

According to *Black’s Law Dictionary*⁹, “*immunity*” means “any exemption from a duty, liability or service of process; especially, such an exemption granted to a public official.” L.B. Curzon also defines “*immunity*” as “freedom or exemption from some obligation or penalty.”¹⁰ Similarly, David Walker refers to it as “a state of freedom from certain legal consequences or the operation of certain legal rules.”¹¹

Regarding “*state immunity*”, on the other hand, Chike Okosa, for example, has stated thus:

The doctrine of [state] immunity is a judicial doctrine derived from the rules of public international law. It precludes bringing a suit against a foreign government in a local forum without its consent. It bars holding the government or its subdivisions liable for breaches of its officers or

⁸ The *European Convention on State Immunity*, 1972, 1 ETS 74; 1495 UNTS 181; and, the *UN Convention on Jurisdictional Immunities of States and Their Property*, 2004, UN Doc A/59/508 (“*UN Jurisdictional Immunities Convention*”); US’ *Foreign Sovereign Immunities Act*, 1976, Pub L No 94-583, 90 Stat 2891 (1976); (1976) 15 ILM 1388; UK’s *State Immunity Act*, (1978) 17 ILM 1123; Singapore’s *State Immunity Act*, 1979, as amended, online: <<http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=DocId%3A%221be1a8f7-0968-4fcc-ac26-39d3a51b7b70%22%20Status%3Ainforce%20Depth%3A0;rec=0>>; Pakistan’s *State Immunity Ordinance, No VI*, 1981, reproduced in Dickinson, Andrew et al (eds), *State Immunity: Selected Materials and Commentary* (Oxford: Oxford University Press, 2004) 496 ; South Africa’s *Foreign States Immunities Act* 87, 1981, as amended by *Foreign States Immunities Amendment Act* 48, 1985, also as amended by *Foreign States Immunities Amendment Act* 5, 1988, online: <<http://www.dfa.gov.za/chiefstatelawadviser/documents/acts/foreignstatesimmunitiesact.pdf>>; Canada’s *State Immunity Act*, RSC 1982, c S-18; (1982) 21 ILM 798 ; and, Australia’s *Foreign States Immunities Act*, 1985, (1986) 25 ILM 715.

⁹ Garner, BA (ed), *Black’s Law Dictionary*, 7th ed (Minnesota: Pitman Group Publishing Co Ltd, 1999) at 753.

¹⁰ Curzon, LB, *A Dictionary of Law*, 2nd ed (London: Pitman Publishing Ltd., 1986) at 387.

¹¹ Walker, David M, *The Oxford Companion to Law* (London: Clarendon Press, 1980) at 18.

agents unless such immunity is expressly waived by statute or by necessary inference from legislative enactment.¹²

According to this commentator, state immunity extends to both direct actions against the state or sovereign and indirect actions against its property, and, until relatively recently, foreign states were afforded immunity not only with regard to government activities, but also with regard to their commercial activities.¹³

In the words of Ian Sinclair:

... The residual rule of [state] immunity precludes the courts of the state of the forum from assuming jurisdiction in a case where a foreign state is directly or indirectly impleaded and where the validity of acts which it has performed in its sovereign capacity may be in issue. In other words, it operates as a bar in limine to the continuance of the proceedings.¹⁴

The earliest known judicial expression of the meaning of state immunity was laid down in the old case of *The Schooner Exchange v McFaddon*¹⁵ by the United States Supreme Court. Here, Chief Justice John Marshall threw light on the rule as follows:

The full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.¹⁶

¹² Okosa, Chike B, “*The Limits of Sovereignty and Diplomatic Immunity*” (2004) 4:1 The Constitution 88 at 88.

¹³ Ibid.

¹⁴ Sinclair, Ian, “*The Law of Sovereign Immunity: Recent Developments*” (1980) 167 HR 113 at 117. See also Abegunde, Babalola, “*Irrelevance of Immunity for International Crimes Particularly Crimes under International Humanitarian Law*” (2007) 4:2 JLD at 1.

¹⁵ 11 U.S. 7 Cranch 116 (1812) at 116.

¹⁶ See also *Mighell v Sultan of Johore* (1894) 1 QBD 149.

In *Alamieyeseigha v The Crown Prosecution Service*¹⁷ (a case involving, inter alia, a claim of state immunity by a governor of a component unit of the Nigerian federation before a UK court), the English High Court of Justice also affirmed that: “It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the process of the forum state. This immunity extends to both criminal and civil liability.”

In the light of the foregoing, one can safely assert that the rule of state immunity in international law naturally flows from the inherent features of sovereign equality and political independence of states. It operates as a procedural bar¹⁸ and shields one sovereign state, its government, administrative departments, property and high-ranking officials from the adjudicatory powers of the judicial tribunals of another sovereign state with respect to the official or public acts of the former state. It, therefore, exists as an exception to a sovereign state’s judicial jurisdiction.

2.3 Rationales for State Immunity in International Law

As referred to throughout the above discussion, various rationales have been proposed for the application of the state immunity rule in international law. Some of the more important of these are discussed in more detail below.

2.3.1 The Symbolic Sovereignty and Non-Intervention Rationale

According to this rationale, the justification for the grant of immunity to a foreign state and its high-ranking officials is implicit in the very sovereignty of the state itself and the

¹⁷ (2007) 18 NWLR (Pt 1066) 423 at 436, paras E-G.

¹⁸ See Currie & Rikhof, *op cit*, note 5 at 576.

consequent need for non-intervention in its internal affairs. This rationale is expressed in so many variations, including: “sovereign capacity” or simply “being a sovereign”; “independence”; “equality”; “dignity”; and their various permutations and combinations.¹⁹

Sovereignty is the hallmark of statehood, and the forum state’s exercise of jurisdiction over the foreign state will not only defeat the very foundation of statehood on which the foreign state is built, but also amount to interference in the foreign state’s independence and internal political administration. Thus, according to Akande and Shah²⁰:

A Head of State is accorded immunity *ratione personae* not only because of the functions he performs, but also because of what he symbolizes: the sovereign state. The person and position of the Head of State reflects the sovereign quality of the state and the immunity accorded to him or her is in part due to the respect for the dignity of the office and of the state which that office represents. The principle of non-intervention constitutes a further justification for the absolute immunity from criminal jurisdiction for Heads of State. The principle is the ‘corollary of the principle of sovereign equality of states, which is the basis for the immunity of states from the jurisdiction of other states (*par in parem non habet imperium*). To arrest and detain the leader of a country is effectively to change the government of that state. This would be a particularly extreme form of interference with the autonomy and independence of that foreign state. The notion of independence means that a state has exclusive jurisdiction to appoint its own government – and that other states are not empowered to intervene in this matter. Were the rule of Head of State immunity relaxed in criminal proceedings so as to permit arrests, such interference right at the top of the political administration of a state would eviscerate the principles of sovereign equality and independence.

However, this rationale is not viewed as very sound and convincing, and has, therefore, been criticized in some quarters. According to Xiaodong Yang, for example, ‘sovereignty’ is a dubious concept to serve as the basis of immunity. The simple fact is that both the defendant state and the forum state have sovereignty. If the defendant state has reason to claim immunity, the forum state has even more reason to demand submission to jurisdiction. That is to say,

¹⁹ Yang, Xiaodong, *State Immunity in International Law* (Cambridge: Cambridge University Press, 2012) at 46.

²⁰ Akande, Dapo & Sangeeta Shah, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts” (2010) 21:4 EJIL 815 at 824.

sovereignty can serve equally forcefully as the basis for immunity and the denial of immunity, depending on from whose perspective the matter is approached. Thus, the idea that immunity is derived from sovereignty is doctrinally self-contradictory and self-defeating, and this conclusion with regard to sovereignty also applies to independence, equality, dignity or any other attribute of statehood.²¹ For Yang, one way to avoid such difficulty, and apparently to be always on the safe side, is to assert that all these qualities and attributes of statehood *collectively* serve as the basis of state immunity. This amounts to saying that a state enjoys immunity because of the sum total of all its attributes in the eyes of international law, because it stands as an amalgam of such attributes. This is to say that a state enjoys immunity because it is a state.²²

However, this line of argument is not convincing. There is no doubt that international law recognizes the sovereignty of both the forum and the foreign state. The forum state is recognized as sovereign within its own territory, likewise the foreign state. However, it could be argued that part of the essence of the state immunity rule is to ensure that the sovereignty of one state does not take supremacy over that of another. Consequently, while recognizing the forum state's sovereignty, international law tries to ensure that the sovereignty of one state does not take supremacy over that of another. Furthermore, the words and phrases such as "independence", "sovereign capacity", and "being a sovereign", it is arguable, are nothing but other ways of expressing the word "sovereignty". They are mere synonyms of "sovereignty" and do not convey meanings different from this root word. Finally, such words as "equality" and "dignity" in the context of state immunity could be seen as attributes or aspects of sovereignty and should not be taken as conveying meanings parallel to or independent of "sovereignty".

²¹ Yang, Xiaodong, *op cit*, note 19 at 50.

²² *Ibid*.

2.3.2 The Fundamental Right Rationale

For the proponents of this rationale²³, state immunity is a fundamental right of a state by virtue of the principle of sovereign equality of states.²⁴ According to them, the traditional starting point for this view is the maxim, “*par in parem non habet imperium*” (an equal has no power over an equal).²⁵

Theodore Giuttari (a major proponent of this rationale) explains the maxim’s historical origin in the classical period of international law as follows:

In this period, the state was generally conceived of as a juristic entity having a distinctive personality and entitled to specific fundamental rights, such as the rights of absolute sovereignty, complete and exclusive territorial jurisdiction, absolute independence and legal equality within the family of nations. Consequently, it appeared as a logical deduction from such attributes to conclude that as all sovereign states were equal in law, no single state should be subjected to the jurisdiction of another state.²⁶

This rationale has been supported by the Italian Cour d’ Cassation in *Special Representative of the Vatican v Piecinkiewicz*²⁷. Some publicists have also been among the strongest supporters of this rationale.²⁸ For Sompong Sucharitkul, while acknowledging the basic principle of territorial jurisdiction, a state’s right to sovereign equality should also be emphasized. According to Sucharitkul, the principle of state jurisdiction must give way to the principle of sovereign equality to effectuate a state’s right to immunity.²⁹

In the words of the Nigerian Court of Appeal:

²³ These proponents include Peter Trooboff, Theodore Giuttari, Sompong Sucharitkul, Richard A Falk, Grigory I Tunkin, and MM Boguslavskij. See Caplan, Lee M, “*State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*” (2003) 97:4 AJIL 741 at 743 and 748-749.

²⁴ See Bankas, Ernest K, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Berlin: Springer, 2005) at 43-45.

²⁵ Garner, BA (ed), *Black’s Law Dictionary*, op cit, note 9. See also *Pº Congreso del Partido* case (1981) 2 All ER 10464.

²⁶ Giuttari, Theodore R, quoted in Caplan, Lee M, op cit, note 23 at 748.

²⁷ (1985) Italy B Int’l 179.

²⁸ See, e.g., Trooboff, Peter D, “*Foreign State Immunity: Emerging Consensus on Principles*” (1986) 200 HR 235 at 266-267.

²⁹ Sucharitkul, Sompol, “*Immunities of Foreign States Before National Authorities*” (1976) 149 HR 87 at 117-119.

The basis of which one state is considered to be immune from the territorial jurisdiction of the courts of another country is expressed in the Latin maxim, “*par in parem imperium non habet*” which literally means that an equal has no authority over an equal. In other words and in legal parlance it means that the sovereign or governmental acts of one state or country are not matters on which the courts of another country will adjudicate...³⁰

This argument also appears to have been supported by the ICJ in the *Jurisdictional Immunities of the State Case (Germany v Italy: Greece intervening)*³¹ (“ICJ Jurisdictional Immunities Case”). According to the Court:

... the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.

As to this line of argument, Xiaodong Yang says it is tempting to think that the basis of state immunity is to be found in the Latin maxim “*par in parem non habet imperium*”. Yang admits there is nothing wrong with such a notion, since the Latin maxim seems to be an almost universally held belief within the circles of international law and beyond, as can be seen from repeated references in national court decisions and in scholarly writings.³²

The thesis argues, however, that a state has no fundamental right to state immunity. The fact that this Latin maxim “*par in parem non habet imperium*” appears to be universally recognized does not imply a legal right in favour of a state. The rule of state immunity is intended to act as a limitation on the adjudicatory powers of the forum state. It only makes

³⁰ *African Reinsurance Corp v AIM Consultants Ltd* (2004) 11 NWLR (Pt 884) 223 at 242-243, paras G-A.

³¹ (2012) ICJ Reps 99 at 123-124, para 57.

³² Yang, Xiaodong, *op cit*, note 19 at 51.

impleading a foreign state an exception to the forum state's exclusive territorial jurisdiction. This rule, therefore, places an obligation on the forum state not to exercise its judicial powers over a foreign state. This obligation does not necessarily translate into a legal right for the foreign state, since an obligation without more does not create a right. According to David Lyons:

The pattern of relations between rights and obligations ... does not seem to be universal. When behavior is simply required or prohibited by law or morals, without presupposing such special relations or transactions between particular individuals ..., we often say that "duties" or "obligations" are imposed. But since these duties or obligations are not "owed" to anyone in particular, we cannot determine who, if anyone, has corresponding rights by noting to whom they are "owed." Indeed, although rights sometimes do correlate with such duties or obligations, we cannot infer that there are such rights merely from the fact there are such duties and obligations.... From the fact that the law requires that A be treated in a certain way, it does not follow, without any further assumptions, that A may be said to have a right to be treated in that way. That is, rights do not follow from duties or obligations, or from requirements or prohibitions, alone. Other conditions must be satisfied.³³

2.3.3 The Practical Courtesy ("Comity") Rationale

This rationale views the state immunity rule as evolving from a forum state's voluntary desire to suspend its right to adjudicatory jurisdiction as a practical courtesy in order to facilitate interstate relations. For supporters of this rationale, state immunity arises not out of a fundamental right of a state, but rather as an exception to the principle of state jurisdiction and justified on the desire to promote international comity.³⁴ The proponents of this rationale, therefore, maintain that the state immunity rule does not constitute a truly binding legal rule.³⁵

³³ Lyons, David, *Rights, Welfare, and Mill's Moral Theory* (Oxford: Oxford University Press, 1994) at 26-27.

³⁴ See Caplan, Lee M, op cit, note 23 at 748-749. See also George, Shobha Varughese, "Head-of-State Immunity in the United States Courts: Still Confused After All These Years" (1995) 64:3 Fordham L Rev 1051 at 1061.

³⁵ See Tomuschat, Christian, "The International Law of State Immunity and Its Development by National Institutions" (2011) 44 Vanderbilt JTL 1105 at 1116-1117.

According to this rationale, state immunity is ascribed to practical necessity or convenience and, particularly, the desire to promote goodwill and reciprocal courtesies among nations.³⁶ The US is at the forefront of arguments in support of this rationale, and this is manifest in a number of American judicial decisions. Chief Justice Marshall recognized this rationale in the *Schooner Exchange* case³⁷ when he stated that “intercourse” between nations and “an interchange of those good offices which humanity dictates and its wants require foster mutual benefit”, and that “all sovereigns have consented to relaxation in practice ... of that absolute complete jurisdiction within their respective territories which sovereignty confers”³⁸. In *Verlinden BV v Central Bank of Nigeria*³⁹, the US Supreme Court held, inter alia, that the grant of state immunity to a foreign state before the US Courts is “a matter of grace and comity on the part of the United States”. The Court reached a similar decision in *Republic of Austria v Altmann*⁴⁰.

This rationale has, however been severely criticized as not representing the position of international law. For Martin Dixon, for example, the assertion that the grant of state immunity by one state to another is based on comity does not mean that the requirement of state immunity is itself based on comity, as opposed to legal obligation. According to him, it is clear that a territorial sovereign is under an international duty to grant immunity. Immunity derives from a rule of binding law and not from some privilege freely granted.⁴¹

³⁶ Ibid.

³⁷ Supra, note 15 at 139.

³⁸ Ibid.

³⁹ 461 US 480, 486 (1983).

⁴⁰ 541 US 677, 694 (2004). See also *Dole Food v Patrickson*, 538 US 468, 479 (2003).

⁴¹ Dixon, Martin, *Textbook on International Law*, 7th ed (Oxford Oxford University Press, 2013) at 186.

2.3.4 The Functional Necessity Rationale

This rationale postulates that the essence of state immunity is not necessarily to shield state officials from the forum state's domestic jurisdiction regarding their misconduct, but rather to ensure that the functions of the foreign state are effectively carried out without unnecessary hindrances.⁴² Thus, the benefit of the immunity does not accrue personally to the officials but to the state they represent.⁴³ According to Michael Tunks, for example:

Head-of-state immunity allows a nation's leader to engage in his official duties, including travel to foreign countries, without fearing arrest, detention, or other treatment inconsistent with his role as the head of a sovereign state. Without the guarantee that they will not be subjected to trial in foreign courts, heads of state may simply choose to stay at home rather than assume the risk of engaging in international diplomacy.⁴⁴

The same rationale also applies to other high-ranking state officials that are also entitled to immunity *ratione personae*. This was why the ICJ, in the *ICJ Arrest Warrant Case*⁴⁵, concluded that though state officials have immunity under international law while serving in office, the immunity is not granted to them for their own benefit, but given to ensure the effective performance of their functions on behalf of their respective states. According to the World Court:

In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in

⁴² Some of the major proponents of this rationale are: Ian Sinclair and Sir Robert Jennings. See Caplan, Lee M, op cit, note 42 at 750. See also Sinclair, Ian, "*The Law of Sovereign Immunity: Recent Developments*" (1980 II) 167 *Recueil Des Cours* 113 at 215.

⁴³ Kochler, Hans, "*The Judgment of the International Court of Justice (2002) and Its Implications for the Exercise of Universal Jurisdiction by National Courts: The Case of Belgium*", in Kochler, H (ed), *Global Justice or Global Revenge? International Criminal Justice at the Crossroads* (New York: Springer, 2003) at 85-101.

⁴⁴ Tunks, Michael A, "*Diplomats or Defendants? Defining the Future of Head-of-State Immunity*" (2002) 52:3 *Duke LJ* 651 at 656.

⁴⁵ (2002) ICJ Reps 3.

international negotiations and intergovernmental meetings.... In the performance of these functions, he or she is frequently required to travel internationally and thus must be in a position freely to do so whenever the need should arise.⁴⁶

A similar argument in support of this rationale is that the grant of state immunity in international law is justifiable on grounds of non-intervention in the internal affairs of other states.⁴⁷ For one proponent of this argument, there is no doubt that court proceedings against foreign states may generate inter-state tensions and interfere with the conduct of international relations.⁴⁸ Thus, in the words of Ian Brownlie, “the rationale rests equally on the dignity of the foreign nation, its organs and representatives, and on the functional need to leave them unencumbered in the pursuit of their mission.”⁴⁹

On this note, the thesis concludes its examination of the rationales for state immunity and proceeds to the question of whether or not state immunity can be waived.

2.4 Historical Origin of State Immunity

State immunity is a rule of customary international law, and has evolved primarily through the gradual accumulation of state practice in the form of domestic court decisions and domestic legislation.⁵⁰ However, the historical origin of this rule has been traced by academic scholars and judges to various sources. These sources are discussed below.

⁴⁶ Ibid at 21-22, para 53.

⁴⁷ Gaukrodger, David, “*Foreign State Immunity and Foreign Government Controlled Investors*” (2010) OECD Working Papers on International Investment 2010/2 at 13-14.

⁴⁸ Ibid.

⁴⁹ Brownlie, Ian, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 326.

⁵⁰ Whytock, Christopher A, “*Foreign State Immunity and the Right to Court Access*” (2013) 93 Boston Univ L Rev 2033 at 2042; Woudenberg, Nout Van, *State Immunity and Cultural Objects on Loan* (Leiden, The Netherlands: Martinus Nijhoff, 2012) at 390; Damrosch, Lori Fisler, “*Changing the International Law of Sovereign Immunity Through National Decisions*” (2011) 44 Vanderbilt JTL 1185 at 1189.

2.4.1 The Personal Equality of Sovereign Heads of State

The rule of state immunity is said to have developed from the personal immunity of sovereign heads of state. For Rosanne Van Alebeek, for instance, the rule according immunity to heads of state “reflects remnants of the majestic dignity that once attached to kings and princes as well as remnants of the idea of the incarnation of the state in its ruler.”⁵¹

In the words of Lord Browne-Wilkinson of the UK House of Lords⁵²,

It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the process of the forum state. This immunity extends to both criminal and civil liability. *State immunity probably grew from the historical immunity of the person of the monarch. In any event, such personal immunity of a head of state persists to the present day; a head of state is entitled to the same immunity as the state itself ... This immunity enjoyed by a head of state in power ... is a complete immunity attaching to the person of the head of state ... and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state ...*⁵³

On the international plane, all sovereigns were considered equal and independent. It would, therefore, be inconsistent if one sovereign could exercise authority over another.⁵⁴ This immunity of sovereigns was traditionally expressed in the Latin maxim: “*par in parem non habet imperium*” (an equal has no authority over an equal).⁵⁵

In medieval times, ‘ruler’ and ‘state’ were regarded as synonymous, and sovereignty was regarded as a personalized concept. Furthermore, by the decision in the *Schooner Exchange* case⁵⁶, it was made clear that the sovereign had a representative character, and actions taken on

⁵¹ Van Alebeek, Rosanne, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford: Oxford University Press, 2008) at 180.

⁵² *R v Bow Street Metropolitan Stipendiary Magistrates, ex parte Pinochet Ugarte (No3)* [“Pinochet case”] [2000] 1 AC 147 at 201, paras G-H.

⁵³ Emphasis supplied.

⁵⁴ See Hillier, Tim, *Sourcebook on Public International Law* (London: Cavendish Publishing, 1998) at 288.

⁵⁵ See, e.g., Bornkamm, Paul Christoph, “*State Immunity Against Claims Arising from War Crimes: The Judgment of the International Court of Justice in Jurisdictional Immunities of the State*” (2012) 13:6 GLJ 773 at 779.

⁵⁶ *Supra*, note 15.

behalf of the sovereign and in the name of the sovereign were capable of attracting the same immunities. In the words of Chief Justice Marshall⁵⁷, the “perfect equality and absolute independence of sovereigns ... have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.”

These notions of equality and immunity of sovereign heads of state later accrued to the states themselves, thus, making the contemporary rule of state immunity a derivative of the sovereign equality of states. In international law, the basic rule is that all sovereign states (bigger and smaller, mightier and weaker) are legally equal, and none is supreme over the other.⁵⁸ One of the logical consequences of this rule, as Richard Gardiner observes, is that a sovereign state cannot be impleaded in the courts of another sovereign state without the former state’s consent.⁵⁹ Otherwise, it would be an affront to the interest and integrity of the former state. Similarly, the British House of Lords has held, per Lord Millet, in *Holland v Lampen-Wolfe*⁶⁰ as follows:

State immunity ... is a creature of customary international law and derives from the equality of sovereign states. It is not a self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt. It is a limitation imposed from without upon the sovereignty of the United Kingdom itself.⁶¹

This historical development of the equality and immunity of sovereigns would explain why the phrase “state immunity” is used interchangeably with “sovereign immunity” in some quarters today.⁶²

⁵⁷ Ibid at 137.

⁵⁸ The *UN Charter*, supra, note 1, art 2(1).

⁵⁹ Gardiner, Richard K, *International Law* (Harlow, Essex, England: Pearson Education Ltd, 2003) at 315. See also the *Pinochet* case, supra, note 52 at 201, paras G-H, per Lord Browne-Wilkinson.

⁶⁰ (2000) 1 WLR 1573 at 1588; (2000) 119 ILR 367.

⁶¹ See also similar judicial pronouncements by the Nigerian Court of Appeal in the following cases: *African Reinsurance Corp v JDP Construction (Nig) Ltd* (2007) 11 NWLR (Pt 1045) 224 at 234, paras D-F; *Oluwalogbon v Govt of the UK & 3 Ors* (2005) 14 NWLR (Pt 946) 760 at 785, paras A-D.

⁶² See, e.g., US’ *Foreign Sovereign Immunities Act*, supra, note 8.

2.4.2 The English Feudal system

Another view situates the origin of the rule of state immunity in the ancient notion of the immunity of the English monarch from suits in his own courts.⁶³ According to Babalola Abegunde:

Sovereign immunity is an English doctrine of great antiquity originating from the old feudalistic structure of the English society. One concept which some people in positions of power have used to escape judicial as well as criminal sanctions is the concept of sovereign immunity. Sovereign immunity was anchored on the belief that the King, being the great overlord of all and at the apex of the English feudal pyramid, could not be sued either in his own court or in the court of any of his vassals. Similarly, the notion that 'the King can do no wrong' implies that no act or omission of the sovereign was open to impeachment, investigation or condemnation on the ground that it was wrongful or tortuous...⁶⁴

2.4.3 Non-interference in Domestic Affairs

Another view holds that the evolution of the rule of state immunity in international law is linked to the international law prohibition on one sovereign state interfering in the internal affairs of another.⁶⁵ In *Buck v Attorney-General*⁶⁶, the English Court of Appeal was called upon to determine the validity of certain provisions of the Constitution of Sierra Leone. The court declined jurisdiction. In his judgment, Diplock, LJ stated, inter alia:

The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state ... As a member of the family of nations, the government of the United Kingdom observes the rules of comity ... the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to itself. One of those rules is that it does not purport to

⁶³ This view is echoed in the case of *Alamiyeseigha v The Crown Prosecution Service*, supra, note 17 at 436, paras E-G, when the court alluded to the fact that state immunity grew from the historical immunity of the person of the monarch.

⁶⁴ Abegunde, Babalola, "Recasting Sovereignty and Federalism: The Way Forward in the Nigerian Political and Constitutional Quagmire", op cit, note 7 at 24.

⁶⁵ See Hillier, Tim, op cit, note 54 at 288.

⁶⁶ (1965) Ch 745.

exercise jurisdiction over the internal affairs of any other independent state, or to apply measures of coercion to it or its property, except in accordance with the rules of public international law. One of the commonest applications of this rule ... is the well known doctrine of sovereign immunity.

2.4.4 International Consensus

A fourth view on the origin of the state immunity rule maintains that it originated from the consensus of the civilized nations. According to this view, majority of states agree upon this rule, and so it becomes part of the law of nations.⁶⁷

However, this notion of consensus has been dismissed in some quarters as a mere fiction. This dismissal is based, *inter alia*, on the differences in the mode of application of the rule among states. In the words of Lord Alfred Denning, MR:

The doctrine of sovereign immunity is based on international law. It is one of the rules of international law that a sovereign state should not be impleaded in the courts of another sovereign state against its will. Like all rules of international law, this rule is said to arise out of the consensus of the civilized nations of the world. All nations agree upon it. So it is part of the law of nations. To my mind, this notion of a consensus is a fiction. The nations are not in the least agreed upon the doctrine of sovereign immunity. The courts of every country differ in their application of it. Some grant absolute immunity. Others grant limited immunity, with each defining the limits differently. There is no consensus whatever. Yet this does not mean that there is no rule of international law on the subject. It only means that we differ as to what that rule is. Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it. It is, I think, for the courts of this country [UK] to define the rule as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, defining the rule in terms which are consonant with justice rather than adverse to it....⁶⁸

From this statement, it appears that Lord Denning's dismissal of the notion of consensus is based on the differences in the approaches to this rule that states have developed over the

⁶⁷ See Gardiner, Richard K, *op cit*, note 59 at 366.

⁶⁸ *Trendtex Trading Corp Ltd v Central Bank of Nigeria* (1977) 2 WLR 356 at 363-364.

years.⁶⁹ Thus, although the rule is agreed upon, its parameters remain uncertain.⁷⁰ However, it could be argued that Denning's perception of the notion of consensus in this case appears misconceived. All nations need not agree on a particular practice before it attains an international custom. It is sufficient if a strong majority of states accepts the practice as binding. The test of "general practice"⁷¹ required for the formation of an international custom does not imply unanimity or universality.⁷²

2.4.5 The 'Sovereign Equality versus Exclusive Territorial Jurisdiction' Conflict

Fifth, the rule of state immunity in international law is said to have been borne out of a tension or conflict between two international law norms, namely, sovereign equality of states, on the one hand, and each state's exclusive territorial jurisdiction, on the other.⁷³ *Schooner Exchange*⁷⁴ itself presents a classic example of this theoretical conflict. In 1812, while sailing off the American coast, the commercial schooner, *Exchange*, owned by two citizens of Maryland, USA, was seized by the French navy. By a general order of the French Emperor, Napoleon Bonaparte, the French navy converted the Schooner into a ship of war. When bad weather forced the ship into the port of Philadelphia, USA, the original owners brought an action in a US District Court against the ship for recovery of their property. The French government resisted the

⁶⁹ See theories of state immunity, *infra* at 12-15.

⁷⁰ See, e.g., Fox, Hazel & Philippa Webb, *The Law of State Immunity*, 3rd ed (Oxford: Oxford University Press, 2013) at 4; Foakes, Joanne et al, "State Immunity: The UN Convention and Current Practice", Chatham House Briefing paper, 11 December 2013 at 2; Finke, Jasper, "Sovereign Immunity: Rule, Comity or Something Else" (2010) 21:4 EJIL 853 at 861; Woudenberg, Nout Van, "Declarations of Immunity from Ceasure of Foreign Artworks and the Legal Position of Sovereign Art Lenders Before US Courts: The Malewicz Case", in Blokker, Niels M (ed), *The Netherlands in court: Essays in Honour of Johan G Lammers* (Leiden: Kininklijke Brill NV, 2006) 223 at 229.

⁷¹ *Statute of the International Court of Justice*, 1945, 33 UNTS 993 ("ICJ Statute"), art 38(1)(b).

⁷² See, e.g., Kaczorowska, Alina, *Public International Law*, 4th ed (London: Routledge, 2010) at 38-39.

⁷³ Caplan, Lee M, "State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory", *op cit*, note 23 at 745-747.

⁷⁴ *Supra*, note 15 at 116.

action, arguing that as a ship of war, the Exchange was an arm of the Emperor and was entitled to the same immunity privilege as the Emperor himself.⁷⁵

On appeal to the US Supreme Court, Marshall, CJ identified the theoretical dilemma in issue. On the one hand, he observed that international law dictated that “the jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”⁷⁶ According to this long-established principle, at the moment the Exchange entered US territorial waters it became subject exclusively to the national authority of the US government, an authority that encompassed the US District Court’s initiation of adverse legal proceedings against the Exchange. On the other hand, he took notice of another fundamental principle of international law, i.e., that the world is comprised of distinct nations, each endowed with “equal rights and equal independence.”⁷⁷ This principle of sovereign equality, the Chief Justice believed, discouraged one sovereign from standing in judgment over another sovereign’s conduct. The result in this case was that sovereign equality took pre-eminence over exclusive territorial jurisdiction.

For Sompong Sucharitkul,

... contact between two states may result in a clash between two fundamental principles of international law, namely, the principle of territoriality or territorial sovereignty, and, the principle of state or national sovereignty.... Normally, the principles of territorial jurisdiction and sovereign equality work individually and often collectively – to promote order and fairness in the international legal system. The former serves to delineate each state’s authority to govern a single geographical area of the world, while the latter guarantees to all states, regardless of size, power or wealth, equal capacity for rights under international law.⁷⁸

⁷⁵ Ibid at 126-127.

⁷⁶ Ibid at 136.

⁷⁷ Ibid at 136.

⁷⁸ Sucharitkul, Sompong, “*Immunities of Foreign States Before National Authorities*”, op cit, note 29 at 117. See also Strauss, Andrew L, “*Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*”, op cit, note 29.

According to this view, this conflict arises any time a forum state seeks legitimately to exercise its right of jurisdiction under international law over a foreign state defendant, regardless of the physical location of the foreign state's representatives. An example usually cited in this regard is where a plaintiff sues a foreign state in domestic proceedings for alleged human rights abuses that occurred outside the forum state.⁷⁹

Notwithstanding the various opinions as to its origin, state immunity is an established and functional rule that governs inter-state relations under international law. This leads to a discussion of the theories of its application.

2.5 Theories of State Immunity

In the history of the application of the state immunity rule, two theories have developed. These theories are (a) the absolute immunity theory; and (b) the restrictive immunity theory.

2.5.1 The Absolute Immunity Theory

Until the end of the nineteenth century, state immunity was absolute, total and complete.⁸⁰ This is called the absolute immunity theory, and it posits that immunity attaches to all actions of foreign states, irrespective of the nature and circumstances of the actions.⁸¹

Commenting on this theory, Richard Gardiner states that:

The notion of sovereignty in an international context means absolute authority subject only to the rules of international law. The natural consequence of this concept would be that a state's activities and assets could in no circumstances be the subject of legal proceedings or any

⁷⁹ See Abegunde, Babalola, *"Recasting Sovereignty and Federalism: The Way Forward in the Nigerian Political and Constitutional Quagmire"*, op cit, note 7. See also Okosa, Chike B, op cit, note 12.

⁸⁰ See the *Schooner Exchange* case, supra, note 15.

⁸¹ Ibid.

enforcement action in another state. This approach attracts the identifier ‘absolute immunity’.⁸²

The theory of absolute immunity arose from the relatively uncomplicated role of the sovereign and of government in the eighteenth and nineteenth centuries.⁸³ As noted above, the earliest known judicial expression of this theory is the *Schooner Exchange* case⁸⁴. At the peak of this theory in the late nineteenth and early twentieth centuries, the UK was one of its leading proponents. Its position was established in a number of important judicial decisions. In the leading case of *The Parlement Belge*⁸⁵, the English Court of Appeal affirmed that every state “declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign ...of any other state, or over the public property of any state which is destined to public use ...though such sovereign, ... or property be within its jurisdiction.”⁸⁶

The hardship occasioned by the absolute immunity rule on individuals and other entities necessitated a change to a more liberal theory. Consequently, the restrictive theory was founded.

2.5.2 The Restrictive Immunity Theory

In the course of time, states’ engagement in commercial and allied activities increased. Furthermore, the process of globalization led to a situation where states no longer confine themselves to purely sovereign acts, but also engage in activities ordinarily belonging to the domain of private persons. As a result, states started shifting from the theory of absolute immunity to that of restrictive (qualified) immunity. This remains the more popular theory today.

⁸² Gardiner, Richard K, op cit, note 59 at 343.

⁸³ Shaw, Malcolm N, op cit, note 3 at 701.

⁸⁴ Supra, note 15.

⁸⁵ (1880) 5 PD 197.

⁸⁶ Ibid at 214-215, per Brett, L.J. See also the *Porto Alexandre* case (1920) PD 30; *Cristina* case (1938) AC 485; *Krajina v Tass Agency* (1949) 2 All ER 274; *Duff Development Co v Kelantan* (1924) AC 797; *Juan Ysmael v Republic of Indonesia* (1955) AC 72; *Mighell v Sultan of Johore*, supra, note 16.

By virtue of this later theory, immunity attaches only to acts of a foreign state which are of a strictly public or governmental nature (acts *jure imperii*). For acts of a commercial or other private nature (acts *jure gestionis*), state immunity is denied. On this development, David J Harris⁸⁷ observes that:

Since the 1920s, socialist states and others have come to engage in trading activities (acts *jure gestionis*) as well as exercising the public functions traditionally associated with states (acts *jure imperii*). In response, many states have moved in their practice to a doctrine of restrictive immunity by which a foreign state is allowed immunity for acts *jure imperii* only. A ... study shows that the courts of a great majority of states in which the matter has been considered in recent years ... now favour the doctrine of restrictive immunity.

This theory remains the more popular theory of state immunity today, as can be seen from the plethora of judicial decisions from various jurisdictions⁸⁸, multilateral treaties⁸⁹, and national statutes⁹⁰ that approve it. A major worrisome factor, however, is that the restrictive immunity regimes of these judicial decisions, treaties and statutes only apply to civil cases and not to criminal proceedings. Consequently, it could be safely concluded that the absolute-theory-restrictive-theory shift is only in relation to state immunity in civil proceedings. As regards criminal prosecution of state officials for international crimes, the rule of state immunity under

⁸⁷ Harris, David J, op cit, note 2 at 258. See also Gardiner, Richard K, op cit, note 59 at 343.

⁸⁸ E.g., *USA v Public Service Alliance of Canada & Ors (Re Canada Labour Code)* (1992) 91 DLR 449; *Holland v Lampen-Wolfe*, supra, note 60 *African Reinsurance Corporation v AIM Consultants Ltd*, supra, note 30 at 242-243, paras G-A; *African Reinsurance Corporation v JDP Construction (Nig) Ltd*, supra, note 61 at 234- 235, paras. G-E; *Oluwalogbon v The Govt of the United Kingdom & Anor*, supra, note 61 at 785, paras E-G, 790, paras D-F; *Prefecture of Voiotia v Federal Republic of Germany*, Case No 11/2000, Areios Pagos (Hellenic Supreme Court) 4 May 2000; (2007) 129 ILR 513; *Ferrini v Federal Republic of Germany*, Italian Court of Cassation, Judgment No 5044 of 11 March 2005; (2006) 128 ILR 658; *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675; (2006) 128 ILR 586; *Al-Adsani v Government of Kuwait & Ors* (1996) 107 ILR 536; *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270; (2006) 2 WLR 70; [2006] UKHL 26; *Al-adsani v United Kingdom*, Appl No 35763/97 (ECHR), ECHR Judgment (Nov. 21, 2001); [2001] ECHR 752; *Kalogeropoulou v Greece and Germany*, ECHR No 0059021/00, Judgment on Admissibility, 12 December 2002; *ICJ Jurisdictional Immunities Case*, supra, note 31.

⁸⁹ See the *European Convention on State Immunity*, supra, note 8; the *UN Jurisdictional Immunities Convention*, supra, note 8.

⁹⁰ E.g., US' *Foreign Sovereign Immunities Act*, supra, note 8; UK's *State Immunity Act*, supra, note 8; Singapore's *State Immunity Act*, supra, note 8; Pakistan's *State Immunity Ordinance*, supra, note 8 ; South Africa's *Foreign States Immunities Act*, supra, note 8; Canada's *State Immunity Act*, supra, note 8; and, Australia's *Foreign States Immunities Act*, supra, note 8.

customary international law still continues to apply.⁹¹ The continued application of this customary international law version of this rule without codification leads to inconsistent results among national courts.⁹² In circumstances where the courts of one state may grant immunity, the courts of another may deny it.

Having discussed the two theories of state immunity, the next sub-section will deal with an examination of the entities to whom the protection of the state immunity rule accrues.

2.6 Entities Entitled to State Immunity Protection

In the application of the state immunity rule (whether absolute or restrictive, and whether in civil or criminal proceedings), one preliminary but vital issue is the determination of the exact classes of entities entitled to immunity protection. These entities could be either instrumentalities of government and integral parts of the foreign state, on the one hand, or government figures (high-ranking officials of the state), on the other hand.

2.6.1 Instrumentalities and Parts of the State

In international law, for a foreign entity to be entitled to the protection of state immunity before the domestic courts or other judicial tribunals of a forum state, the entity must be the government or constitute an integral part of the government of the foreign state. It must be so closely connected with the government as to be an organ or department of the foreign state, one

⁹¹ See, e.g., Currie & Rikhof, *op cit*, note 5 at 580.

⁹² See, e.g., Finke, Jasper, “*Sovereign Immunity: Rule, Comity or Something Else?*”, *op cit*, note 70 at 854-855; Wuerth, Ingrid, “*National Court Decisions and Opinio Juris*”, a conference paper prepared for “*The Role of Opinio Juris in Customary International Law*” at the Duke-Geneva Institute in Transnational Law, University of Geneva, July 12-13, 2013 at 6-8; *ICJ Arrest Warrant Case*, *supra*, note 45; *Ferrini v Federal Republic of Germany*, *supra*, note 88; the *Pinochet* case, *supra*, note 52; Focarelli, Carlo, “*Denying Foreign State Immunity for Commission of International Crimes – The Ferrini Decision*” (2005) 54 ICLQ 951; Gattini, Andrea, “*War Crimes and State Immunity in the Ferrini Decision*” (2005) 3:1 JICJ 224. Foakes, Joanne et al, “*State Immunity: The UN Convention and Current Practice*”, *op cit*, note 70 at 6-9.

through which the foreign state carries out part of its governmental functions.⁹³ In this situation, a department or agency of a foreign state is entitled to state immunity, though it has a separate legal personality under the domestic law of the foreign state.⁹⁴

An area of controversy under this aspect of the state immunity rule is entitlement to immunity of component units of federal states.⁹⁵ In contemporary times, the determining factors appear to be twofold. The first is the degree of independence and autonomy enjoyed by the said component units within the federal arrangement in question. The second is the ability of these units to conduct international relations on their own under the relevant constitutional arrangement of the federal state in question. In *Mellenger v New Brunswick Development Corporation*⁹⁶, one of the questions for determination by the English Court of Appeal was entitlement to state immunity of the Province of New Brunswick, a component unit of the Canadian federation. The Court observed, *inter alia*, that under the Canadian Constitution, “Each provincial government, within its own sphere, retains its independence and autonomy directly under the Crown ... it follows that the Province of New Brunswick is a sovereign state in its own right and entitled, if it so wishes, to claim sovereign immunity.”⁹⁷

⁹³ *Trendtex Trading Corp v Central Bank of Nigeria*, *supra*, note 68 at 393.

⁹⁴ Fox, Hazel & Philippa Webb, *The Law of State Immunity*, 3rd ed, *op cit*, note 70 at 355; *Bacus Srl v Servizio National del Trigo* (1957) 1QB 438; *Krajina v Tass Agency* (1949) 2 All ER 274; Foakes, Joanne & Elizabeth Wilmschurst, “State Immunity: The United Nations Convention and Its Effect” (May 2005) Chatham House Briefing Paper: International Law Programme, IPL BP 05/1 at 7; Gaukrodger, David, “Foreign State Immunity and Foreign Government Controlled Investors”, *op cit*, note 47 at 14-15; Chance, Clifford, “State Immunity and State-Owned Enterprises: Report Prepared for the Special Representative of the UN Secretary General on Business and Human Rights”, online: <file:///C:/Documents%20and%20Settings/Owner/My%20Documents/Downloads/Clifford-Chance-State-immunity-state-owned-enterprises-Dec-2008.PDF>.

⁹⁵ See O’Keefe, Roger & Christian Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford: Oxford University Press, 2013) at 48; Bernier, I, *International Legal aspects of Federalism* (London: Sweet & Maxwell, 1973) at 121; *Sullivan v State of Sao Paolo* 122 F.2d 355 (1954); Bankas, Ernest K, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts*, *op cit*, note 24 at 196.

⁹⁶ (1971) 2 All ER 593; (1971) 52 ILR 322.

⁹⁷ (1971) 2 All ER 593 at 595; (1971) 52 ILR 322 at 324.

In *Alamieyeseigha v The Crown Prosecution Service*⁹⁸, the issue arose before the English High Court as to whether Bayelsa State, a component unit of the Nigerian federation, could, on its own, be entitled to state immunity under international law. On this, the court held thus:

... there is no authority that the federal unit of the state, which is what Bayelsa State is, can in certain circumstances, partake of the sovereignty of the state as a whole and obtain state immunity... *it does not follow that every part of a federal state is entitled to immunity from criminal proceedings, but it is a case-sensitive decision if a particular member of a federal state can be regarded as a separate state so that its head becomes entitled to immunity from criminal proceedings.*⁹⁹

In *Bank of Credit and Commerce International v Price Waterhouse*¹⁰⁰, Justice Laddie of the English High Court held that the head of a member of a federation, in that case the Ruler of Abu Dhabi, was not entitled to immunity, while the President of the federal state of which Abu Dhabi formed part, i.e., the United Arab Emirates, was entitled to state immunity.

A vivid explanation for this approach can be found in *Oppenheim's International Law*¹⁰¹, where the learned authors are of the view that:

Where, as happens frequently, a federal state assumes in every way the external representation of its member states, so far as international relations are concerned, the member states make no appearance at all.... Here the member states are sovereign too, but only with regard to internal affairs. All their external sovereignty being absorbed by the federal state, they are not international persons at all.

Some relevant municipal statutes and multilateral treaties have also adopted this trend of according immunity to independent and autonomous federal component units.¹⁰²

⁹⁸ Supra, note 17 at 437-438, paras F-C; (2005) EWCH 2704.

⁹⁹ Emphasis supplied.

¹⁰⁰ (1997) 4 All ER 108, (1997) 111 ILR 604.

¹⁰¹ Jennings, Robert & Arthur Watts, *Oppenheim's International Law, Vol 1, 9th ed* (Oxford: Oxford University Press, 1992) at 252.

¹⁰² See e.g., UK's *State Immunity Act*, supra, note 8, s 14(5); Canada's *State Immunity Act*, supra, note 8, s 2; *European Convention on State Immunity*, supra, note 8, art 28. See also Sinclair, Ian, "The European Convention on State Immunity" (1973) 22 ICLQ 254.

2.6.2 Government Figures

In international law, treaty and judicial practice have established that the following high-ranking state officials may benefit from state immunity before the courts of foreign states:

2.6.2.1 Heads of State and/or Government

The most senior public figures of a state to whom the protection of state immunity is most readily accorded in international law are serving heads of state and/or government.¹⁰³ In line with this position, the courts of various states have declined jurisdiction in both civil and criminal cases instituted against heads of state and/or government of other states.¹⁰⁴ In *Re Gaddafi*¹⁰⁵ (which dealt with alleged complicity in acts of terrorism), the French Cour de Cassation held that a serving head of state (former Libyan leader – Muammar Gaddafi) is immune from prosecution in national courts, even in relation to serious acts of terrorism. In *Re Castro*¹⁰⁶, the Spanish Audiencia Nacional reached a similar conclusion. It held that the Spanish courts had no jurisdiction to try Fidel Castro, the then Cuban President, even for international crimes, since he enjoyed state immunity, as long as he was serving in his capacity as head of state. Also, in *Tachiona v Mugabe*¹⁰⁷, a US court held that the US' *Torture Victim Protection Act*¹⁰⁸ did not override the traditional immunity given to heads of state. In *Application for Arrest*

¹⁰³ See, e.g., George, Shobha Varughese, “Head-of-State Immunity in the United States Courts: Still Confused After All These Years” (1995) 64:3 Fordham L Rev 1051 at 1062.

¹⁰⁴ It is worthy to note at this stage that there is a “currency of status” issue on the entitlement of these and other relevant high-ranking state officials to immunity, i.e., entitlement to immunity is affected by whether they are currently sitting state officials. This is addressed below.

¹⁰⁵ Arrêt no. 144, 14 March 2001, Cass. Crim. 1. See also Sappala, S, “Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Gaddafi Case Before the French Cour de Cassation” (2001) 12 EJIL 595.

¹⁰⁶ Cited in Sawma, Gabriel, “The Immunity of Heads of State under International Law”, online: <<http://www.gabrielsawma.blogspot.com>>.

¹⁰⁷ 169 F. Supp. 2d 259 (S.D.N.Y. 2001).

¹⁰⁸ 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

*Warrant against Robert Mugabe*¹⁰⁹ (“*Re Mugabe*”), an English court held that a warrant could not be issued for the arrest of the Zimbabwean President on charges of international crimes on the basis that he was a serving head of state at the time the proceedings were brought.

The immunity of heads of state and/or government may become relevant in many different ways before foreign courts. It may concern current heads of state and/or government officially visiting another state or leading an official mission or, regardless of their physical presence in the forum state, it may arise in connection with acts carried out by them in their home states.¹¹⁰ In *Saltany v Regan*¹¹¹, a US District Court granted head of state immunity to the UK Prime Minister in an action in tort for personal injuries and damage to property brought by some civilian residents of Libya in the aftermath of the US bombing of Libya. The claimants alleged that the UK Prime Minister had allowed military bases in the UK to be used by the US air force for the operation against Libya.

Surprisingly, head of state immunity has also been granted by a US Court to Prince Charles, Prince of Wales, as the heir to the British throne, even though he is not yet the British Monarch.¹¹²

2.6.2.2 Foreign Ministers

Like heads of state and/or government, foreign ministers may, under contemporary international law, enjoy state immunity. This is mainly due to the nature of their functions as the principal link between their states and other members of the international community of states.

As Rohan Perera put it:

¹⁰⁹ Reported in (2004) 53:3 ICLQ 769.

¹¹⁰ Bianchi, Andrea, “*Immunity versus Human Rights: The Pinochet case*” (1999) 10:2 EJIL 237.

¹¹¹ (1988) 80 ILR 19.

¹¹² *Kilroy v Windsor* (1978) Dig US Practice Int’l L 64.

... heads of states, heads of governments and ministers of foreign affairs constitute the ‘basic threesome’ or the triumvirate of state officials who enjoy personal immunity. Under international law, it is these three categories of officials who are accorded special status by virtue of their office and their functions...¹¹³

Speaking specifically on the immunity of foreign ministers, he continued:

The centrality of his role in the conduct of international affairs on behalf of the sovereign would demand that the minister of foreign affairs be treated on par with the head of state, with regard to the scope and extent of the jurisdictional immunities he would enjoy. The basic rationale which underlined the according of jurisdictional immunities to a head of state would apply with equal force to a foreign minister, given the representative character and functional role of the latter.¹¹⁴

The ICJ has expressly endorsed the immunity of the foreign minister in its judgment in the *ICJ Arrest Warrant Case*¹¹⁵. In this case, a Belgian judge issued an arrest warrant against Mr. Abdulaye Yerodia Ndombasi, the then serving Foreign Affairs Minister of the Democratic Republic of Congo (DRC). The DRC initiated proceedings against Belgium in the ICJ, arguing, inter alia, that Belgium’s non-recognition of the immunity of the DRC’s serving Foreign Affairs Minister was a violation of international law. In its judgment, the Court upheld the Minister’s immunity. It found that Belgium had failed to respect the immunity from criminal jurisdiction and the inviolability which the DRC’s foreign minister enjoyed under international law.

It appears that, apart from the nature of their office, the special position of foreign ministers in this regard also has a treaty foundation. Under article 7(2) of the *Vienna Convention on the Law of Treaties*¹¹⁶, the foreign minister is considered to represent his or her state and to have authority to perform all acts relating to a treaty without the need for full powers. In confirming this special position, the ICJ stated that “A Minister for Foreign Affairs, responsible

¹¹³ Perera, Rohan, “Immunity of State Officials from Foreign Criminal Jurisdiction”, online: <<http://www.lankamission.org/content/view/598/>>.

¹¹⁴ Ibid.

¹¹⁵ Supra, note 45.

¹¹⁶ 1969, 1155 UNTS 331.

for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence."¹¹⁷ The consequence of such status was, on the facts before the Court, to confer personal inviolability and immunity from criminal jurisdiction, the Court stating that no distinction can be drawn between acts performed by a serving foreign minister in an 'official' capacity, and those claimed to have been performed in a 'private' capacity.

2.6.2.3 Other Persons of High Rank

For this class of persons, it appears that their entitlement to state immunity in international law is still controversial.¹¹⁸ These persons may include the defence minister or head of the armed forces, trade minister, and other senior cabinet members of the government of a sovereign state.¹¹⁹ For example, in *Belhas v Ya'alon*¹²⁰, a US Court of Appeal affirmed dismissal of criminal charges for, inter alia, war crimes and crimes against humanity leveled on General Moshe Ya'alon, the retired Head of Intelligence of the Israeli Defence Forces (IDF). The charges stemmed from General Ya'alon's alleged involvement in the IDF's April 1996 shelling of a UN peacekeepers' compound in Qana, South Lebanon, in which several hundred Lebanese civilians suffered injury or death. The complainants contended that Ya'alon's failure to prevent the shelling violated principles of international law and, inter alia, constituted war crimes, extra-judicial killing and crimes against humanity, in that General Ya'alon bore command

¹¹⁷ See the *ICJ Arrest Warrant Case*, supra, note 45 at 22, para 53. See also Fox, Hazel & Philippa Webb, *The Law of State Immunity*, 3rd ed, op cit, note 70 at 558.

¹¹⁸ See Shaw, Malcolm N, *International Law*, 6th ed, op cit, note 3 at 738-740.

¹¹⁹ Ibid.

¹²⁰ 515 F. 3d 1279 (D.C. Cir. Feb. 15, 2008).

responsibility. However, a US District Court dismissed these charges on grounds of state immunity for General Ya'lon. The Court of Appeal upheld the dismissal.

In considering the immunity of these other persons of high rank, it must be noted that important international treaties¹²¹ acknowledge the existence of a category of “other persons of high rank” without elucidating the category. The ICJ judgment in the *ICJ Arrest Warrant Case*¹²², while confirming the existence of such category, does not proceed beyond this. It seems clear, however, that the ICJ had in mind holders of offices of similar ranks and political significance to those of the traditional triad of heads of state, heads of government, and foreign ministers. In practice, such immunity is likely, therefore, to be confined to senior officials at ‘cabinet level’ (including, presumably, vice-president or deputy prime minister) who frequently represent their states internationally and arrest or detention of whom could reasonably be construed as a serious interference with the government of the foreign state concerned.¹²³ This is consistent with the view of the International Law Commission’s (ILC’s) Special Rapporteur, who has stated that such immunity is confined to “a narrow circle of high-ranking state officials”.¹²⁴

Some other judicial pronouncements on this position do not also offer a clear solution. In *Application for Arrest Warrant against General Shaul Mofaz (“Re Mofaz”)*¹²⁵, for instance, District Judge Pratt of the English Magistrate Court stated thus:

The function of various Ministers will vary enormously depending upon their sphere of responsibility. I will think it very unlikely that ministerial

¹²¹ E.g., the *Convention on Special Missions*, 1969, 1400UNTS 231, (1970) 9 ILM 127; the *Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character*, 1975, Doc.A/CONF.67.16.

¹²² *Supra*, note 31.

¹²³ Foakes, Joanne, “Immunity for International Crimes?: Developments in the Law on Prosecuting Heads of State in Foreign Courts” Chatham House Briefing Paper, November 2011, IL BP 2011/02 at 6.

¹²⁴ Kolodkin, Roman, *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc A/CN.4/631 (June 2010), para 94(i).

¹²⁵ Reprinted in (2004) 53:3 ICLQ 771.

appointments such as Home Secretary, Employment Minister, Environment Minister, Culture, Media and Sports Minister would automatically acquire a label of state immunity. However, I do believe that the Defence Minister may be a different matter.¹²⁶

The distinction drawn by the judge in this case between the Defence Minister and other ministers is difficult to accept. In contemporary international affairs where many ministers represent their states internationally on official matters affecting their respective portfolios, it is difficult to imagine why these ministers should not qualify for state immunity like their Defence counterpart. Rohan Perera¹²⁷ thinks that the right approach should be criteria-based rather than enumerative. For him,

It would ... be more productive and useful to embark on a process of identification and defining of applicable criteria, in according jurisdictional immunities to high ranking officials, paying due regard to the functional and representative character principles. This process by identifying specific indispensable part of the functions of the officials should be paramount.¹²⁸

In line with this reasoning, it may be argued that in view of the enormous state powers that many other cabinet members of a modern government exercises in their different fields, they may, in some circumstances, benefit from state immunity like the traditional triumvirate of heads of state, heads of government, and foreign ministers. For example, the exercise of the powers of the defence minister, particularly in the conduct of armed conflicts, stationing of troops on foreign soil, or other activities relating to military alliances, may necessitate taking holders of such offices as “other high-ranking state officials” for state immunity purposes. In this connection, it needs also to be recognized that the defence and foreign policies of the modern state are inextricably linked, and their line of demarcation could be tenuous. Another example relates to the powers of the interior minister in the co-ordination of the state’s police.

¹²⁶ Ibid at 773.

¹²⁷ Op cit, note 113.

¹²⁸ Ibid.

This argument appears vindicated by a relatively recent event in France. Here, the Paris Prosecutors' Office dismissed a suit accusing Mr. Donald Rumsfeld, a former US Defence Secretary, of torture.¹²⁹ The reason for the dismissal, according to the Prosecutors' Office, was that Mr. Rumsfeld benefited from a "customary" immunity from prosecution granted to heads of state and government and foreign ministers.¹³⁰ In *Re Mofaz*¹³¹ and *Re Ehud Barak*¹³², respectively, the English Magistrate Court granted immunity to defence ministers. This court has also accorded the same immunity to a minister of commerce and international trade.¹³³ However, in *Bat v Investigating Judge of the German Federal Court & Ors*¹³⁴, the English High Court held that the secretary of the executive office of the National Security Council of Mongolia fell clearly outside the circle of high officials entitled to such immunity, describing him as an administrator far removed from the narrow circle of those who hold the high-ranking office to be equated with the state they personify and from those identified by the ICJ.¹³⁵

The ICJ's decision in the *Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda) (Jurisdiction and Admissibility of the Claim)*¹³⁶, though not based on state immunity, could be said to have impliedly approved the grounds suggested above for the extension of immunity to "other persons of high rank". In that

¹²⁹ *Re Rumsfeld*, 2007/09216/SGE. See also Leveque, Thierry et al, "French Prosecutors Throw Out Rumsfeld Torture Case", online: <<http://www.reuters.com/article/2007/11/23/us-france-rights-rumsfeld-idUSL238169520071123>>.

¹³⁰ Ibid.

¹³¹ Supra, note 125.

¹³² Unreported, see Foakes, Joanne, "Immunity for International Crimes?: Developments in the Law on Prosecuting Heads of State in Foreign Courts", op cit, note 123 at 6; Franey, Elizabeth Helen, *Immunity, Individuals and International Law: Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (Saarbrücken, Germany: Lap Lambert Academic Publishing, 2011) at 146–47.

¹³³ See *Re Bo Xilai* (2005) 128 ILR 713.

¹³⁴ [2011] EWHC 2029 (Admin).

¹³⁵ See also Foakes, "Immunity for International Crimes?: Developments in the Law on Prosecuting Heads of State in Foreign Courts", op cit, note 123 at 7; Wickremasinghe, Chanaka, "Immunities Enjoyed by Officials of States and International Organizations", in Evans, Malcolm D, *International Law*, 4th ed (Oxford: Oxford University Press, 2014) 379 at 391; Foakes, Joanne & Roger O'Keefe, "Article 12", in O'Keefe, Roger & Christian Tams, op cit, note 95, 210 at 224.

¹³⁶ (2006) ICJ Reps 6.

case the ICJ, while recognizing the powers of the triumvirate of heads of state, heads of government, and foreign ministers to represent the state and make statements that bind the state, also took note of similar powers of finance ministers. The World Court further stated thus:

... with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials.¹³⁷

2.6.2.4 Members of Foreign Armed Forces

Tim Hillier asserts that this category of persons usually enjoys limited immunity from local jurisdiction while in the territory of a foreign state.¹³⁸ Such immunity only applies where the forces are present with the consent of the host state, and the nature and extent of the immunity generally depends on the circumstances under which the forces were admitted, although simple admission itself can produce legal consequences. The receiving state impliedly agrees not to exercise jurisdiction in such a way as to impair the integrity and efficiency of the forces.¹³⁹

Under a status of forces agreement, the commander of visiting forces off the courts of the sending state have primacy of jurisdiction over offences committed within the area where the forces are stationed or while members of the forces are on duty. Usually, the status and immunity of foreign troops is the subject of specific agreement. Thus, under the *Agreement Regarding the*

¹³⁷ Ibid at 27, para 47.

¹³⁸ Hillier, Tim, op cit, note 54 at 303.

¹³⁹ Ibid.

*Status of Forces of the Parties to the North Atlantic Treaty*¹⁴⁰, the sending state has the primary right to exercise jurisdiction over NATO troops stationed in other states.¹⁴¹

2.6.2.5 Heads of Component Units of Federal States

Another area of controversy is whether the head of a component unit of a federal state is entitled to state immunity under international law. As earlier observed, a component unit of a federation is entitled to state immunity if it enjoys independence and autonomy within the federal arrangement in question and can, on its own, enter into international relations with foreign states.¹⁴²

It, therefore, logically follows that the head of a component unit of a federal state (e.g., a state governor in the US and Nigeria, a provincial premier in Canada or a Canton head in Switzerland) is not entitled to state immunity in international law, unless his or her component unit is independent and autonomous within the federation and can, on its own, conduct international relations with foreign states. As noted earlier, Laddie, J. of the English High Court, apparently gave effect to this position (in a civil claim) in *Bank of Credit and Commerce International v Price Waterhouse*.¹⁴³ He held that the head of a component member of a federation (the Ruler of Abu Dhabi) was not entitled to state immunity, while the head of the federation of which Abu Dhabi formed part (the United Arab Emirates) was so entitled.

¹⁴⁰ 1951, art VII, online: < <http://www.statewatch.org/news/2014/jan/uk-usa-agreement-1951.pdf>>. See also *Privileges and Immunities (North Atlantic Treaty Organisation) Act*, RSC, 1985, c P-24, art 12 (Canada).

¹⁴¹ *Agreement Regarding the Status of Forces of the Parties to the North Atlantic Treaty*, supra, note 140, art VII.

¹⁴² *Mellenger v New Brunswick Development Corporation*, supra note 96; *Bank of Credit and Commerce International v Price Waterhouse*, supra, note 100.

¹⁴³ Supra, note 100.

In *Alamieyeseigha v The Crown Prosecution Service*¹⁴⁴, the English High Court extended this proposition to criminal matters (money laundering) when it denied immunity from criminal prosecution in the UK to the then governor of Bayelsa State of Nigeria, Mr. Diepreye Solomon Peter Alamieyeseigha. Part of the court's conclusion was that Bayelsa State does not qualify as a state in international law and does not have the competence to conduct international relations or external affairs under the *Constitution of the Federal Republic of Nigeria*¹⁴⁵. Consequently, the governor of Bayelsa State does not qualify as a head of state [or a high-ranking state official] and is, therefore, not entitled to state immunity in international law.

Part of the difference here may be that in some jurisdictions, such as Canada, the sub-unit gets its immunity not as a "state" but as a component part of the state.

In view of the above analysis regarding the classes of state officials entitled to the protection of state immunity, the next sub-heading of this thesis examines the types of immunity available in international law to these classes of officials.

2.7 Types of Immunity of State Officials

In international law, the state immunity available to high-ranking state officials is divided into two types according to the categories of the officials. These types of immunity are: immunity *ratione persona* (personal immunity or status-based immunity), and immunity *ratione materiae* (functional immunity or function-based immunity).¹⁴⁶ This is a particularly important

¹⁴⁴ Supra, note 17.

¹⁴⁵ 1999, online: < <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> >.

¹⁴⁶ D' Argent, Pierre, "Immunity of State Officials and Obligation to Prosecute" (2013) 4 Cahiers du CeDIE Working Papers 1 at 5. See also Asian-African Legal Consultative Organization, "Immunity of State Officials from Foreign Criminal Jurisdiction" a background paper presented at the Inter-Sessional Meeting of Legal Experts to Discuss Matters Relating to International Law Commission, held at AALCO Secretariat, New Delhi, India on 10 April 2012, at 3; Webb, Philippa, *International Judicial Integration and Fragmentation* (Oxford: Oxford University Press, 2013) at 72-83; Knuchel, Sevrine, "State Immunity and the Promise of Jus Cogens" (2011) 9:2 Northwestern JIHR 149 at 151.

point here, as the effect of this classification is more felt in international criminal proceedings against these state officials.

2.7.1 Immunity *Ratione Personae* (Personal Immunity)

This type of immunity attaches to a restricted class of high-ranking state offices. According to the ICJ, these offices are those of the triad of heads of state, heads of government, and foreign ministers, and possibly, a limited category of other very high-ranking state representatives.¹⁴⁷ The ICJ, however, failed to define the state officials that belong to this limited category of other very high-ranking state representatives. This lapse, it is argued, will certainly lead to confusion and inconsistent practice among national courts of states. In criminal cases, while an incumbent occupies any of these offices, he is personally immune and inviolable and, therefore, cannot be detained, arrested, or prosecuted by the authorities of a state other than his home state.¹⁴⁸

The effect of immunity *ratione personae* before national courts is uncontroversial. It absolutely bars from criminal prosecution – including procedural steps such as arrest – an incumbent of a protected office (provided he has not left office) in respect of both his official and personal acts, whether done before or during the incumbency of his office.¹⁴⁹ In the *ICJ Arrest*

¹⁴⁷ See the *ICJ Arrest Warrant Case*, supra note 45 at 21-25, paras 51-59. See also the *UN Convention on Special Missions*, supra, note 121, art 21, para 2.

¹⁴⁸ See Currie & Rikhof, op cit, note 5 at 581. See also Cassese, Antonio et al, *Cassese's International Criminal Law*, 3rd ed (Oxford: Oxford University Press, 2013) at 318-322; O'Keefe, Roger, "Privileges and Immunities not Affected by the Present Convention", in O'Keefe, Roger & Christian Tams (eds), op cit note 95, 73 at 85; Rothwell, Donald R, *International Law: Cases and Materials With Australian Perspectives* (Cambridge: Cambridge University Press, 2011) at 356; Koller, David S, "Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as It Pertains to the Security Council and the International Criminal Court" (2004) 20 Am U Int'l L Rev 7.

¹⁴⁹ Currie & Rikhof, op cit, note 5 at 581-582. See also Murphy, Sean D, "Immunity *Ratione Personae* of Foreign Government Officials and other Topics: The Sixty-Fifth Session of the International Law Commission", online: <http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2219&context=faculty_publications>.

*Warrant Case*¹⁵⁰, for example, the Court held that the absolute nature of the immunity *ratione personae* enjoyed by a serving foreign minister subsists even upon allegations of his commission of international crimes and applies even when the foreign minister is abroad on a private visit. As well, the ICJ admitted that it “has been unable to deduce . . . that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.”¹⁵¹ For the court:

... the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.¹⁵²

¹⁵⁰ Supra, note 45 at 22, para 55.

¹⁵¹ Ibid at 24, para 58.

¹⁵² Ibid at 23, paras 54-55.

Although broad in its substantive application, this type of immunity is limited both temporally and as to the category of office-holders to whom it may apply. Once the individual has left office, he or she ceases to be entitled to such immunity.¹⁵³

In summarizing the general nature of this type of immunity, Dapo Akande and Sangeeta Shah state as follows:

It is clear that senior officials who are accorded immunity *ratione personae* will be hindered in the exercise of their international functions if they are arrested and detained whilst in a foreign state. For this reason, this type of immunity, where applicable, is commonly regarded as prohibiting absolutely the exercise of criminal jurisdiction by states. The absolute nature of the immunity *ratione personae* means that it prohibits the exercise of criminal jurisdiction not only in cases involving the acts of these individuals in their official capacity but also in cases involving private acts. Also, the rationale for the immunity means that it applies whether or not the act in question was done at a time when the official was in office or before entry to office. What is important is not the nature of the alleged activity or when it was carried out, but rather whether the legal process invoked by the foreign state seeks to subject the official to a constraining act of authority at the time when the official was entitled to the immunity. Thus, attempts to arrest or prosecute these officials would be a violation of the immunity However, since this type of immunity is conferred ... in order to permit free exercise by the official of his or her international functions, the immunity exists for only as long as the person is in office.¹⁵⁴

2.7.2 Immunity *Ratione Materiae* (Functional Immunity)

Immunity *ratione materiae* or functional immunity, unlike immunity *ratione personae*, applies to a much broader class of persons but to a much more restricted category of acts. As a matter of customary international law, it may accrue to all state officials, irrespective of their hierarchy in the state. Thus, this type of immunity can apply to bar foreign criminal prosecution

¹⁵³ Foakes, Joanne, “Immunity for International Crimes?: Developments in the Law on Prosecuting Heads of State in Foreign Courts”, op cit, note 123 at 4.

¹⁵⁴ Akande, Dapo & Sangeeta Shah, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts”, op cit, note 20 at 819. See also D’Argent, Pierre, “Immunity of State Officials and Obligation to Prosecute”, op cit, note 146 at 5-6.

of the official acts of other cabinet ministers, as well as officials of other agencies and instrumentalities of a state. While personal immunity attaches to particular offices, functional immunity immunizes certain official acts.¹⁵⁵ Functional immunity covers the official acts of all state officials (including heads of state) and is determined by reference to the nature of the acts in question rather than the particular office of the official who performed them.¹⁵⁶

Functional immunity is derived from the traditional rules of international law, in which official actions are attributable to the state rather than the individuals that perform them.¹⁵⁷ This conduct-based immunity may be relied on by former officials in respect of official acts performed while in office, as well as by serving state officials. It may also be relied on by persons or bodies that are not state officials or entities but have acted on behalf of the state.¹⁵⁸

In *Prosecutor v Blaskic*¹⁵⁹, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) shed some light on the application of this type of immunity in the international criminal justice system. In the words of the Chamber:

[State] officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called ‘functional immunity’. This is a well established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.

¹⁵⁵ *Case Concerning Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)* (2008) ICJ Reps 177 at paras 194-197.

¹⁵⁶ Foakes, Joanne, “Immunity for International Crimes?: Developments in the Law on Prosecuting Heads of State in Foreign Courts”, op cit, note 123.

¹⁵⁷ See Currie & Rikhoff, op cit, note 5 at 583.

¹⁵⁸ Akande & Shah, op cit, note 122 at 825. See also Simbeye, Yitiha, “International Criminal Courts, Immunity Ratione Materiae of Incumbent High-ranking State Officials and the Subpoena Duces Tecum” (2013) 4:1 Open University LJ 180; Fox, Hazel & Philippa Webb, *The Law of State Immunity*, 3rd ed, op cit, note 70 at 568.

¹⁵⁹ *Prosecutor v Blaškić (Objection to the Issue of Subpoena Duces Tecum)*, IT-95-14-AR 108 (1997), (1997) 110 ILR 607 at 707, para 38.

One condition precedent, however, to the applicability of this type of immunity is that the individual who performed the act sought to be immunized must at all relevant times be acting in an official capacity on behalf of the state. Thus, any act not performed on behalf of the state or not constituting an official act does not qualify for state immunity protection. In the words of Robert Currie and Joseph Rikhof, “In order for immunity *ratione materiae* to apply, the individual must be acting in an official capacity. In other words, the acts protected are acts performed on behalf of the state. This requirement of official capacity operates to exclude from protection those acts which were not performed on behalf of the state.”¹⁶⁰

2.8 Nature of State Immunity in International Law

Over the years, there has been controversy as to the true nature of the state immunity rule in international law, i.e., whether state immunity constitutes a procedural bar or a substantive defence. Some scholars argue that it constitutes both a procedural bar and a substantive defence.¹⁶¹ Others maintain that the rule only operates as a procedural bar to actions (civil and criminal) against a foreign state and its high-ranking officials.¹⁶²

Those that contend that state immunity constitutes both a procedural bar and a substantive defence maintain that as a procedural plea, there is a closer identification of the official's immunity with that enjoyed by the state itself. However, they warn that this close identification may cause any exception to the state's immunity, such as that for commercial transactions, to apply equally to the official and to render the act performed by the official non-

¹⁶⁰ Currie & Rikhoff, op cit, note 5 at 584.

¹⁶¹ Fox, Hazel, “*Functions of State Officials and the Restrictive Rule of State Immunity*”, in Kohen, Marcelo et al (eds), *Perspectives of International Law in the 21st Century* (Leiden, The Netherlands: Koninklijke Brill NV, 2012) 127 at 131; Akande, Dapo & Sangeeta Shah, “*Immunities of State Officials, International Crimes, and Foreign Domestic Courts*”, op cit, note 20 at 826 (as regards immunity *ratione materiae*).

¹⁶² Gaukrodger, David, “*Foreign State Immunity and Foreign Government Controlled Investors*”, op cit, note 162 at 5; McGregor, Lorna, “*Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*” (2007) 18:5 EJIL 903 at 906; Currie & Rikhof, op cit, note 5 at 583; Fox, Hazel & Philippa Webb, op cit, note 70 at 1.

immune.¹⁶³ These scholars further argue that to treat state immunity as a substantive defence automatically implies the imputability of the official's act to the state, and this might mistakenly merge two separate and distinct issues.¹⁶⁴

According to Akande and Shah, two related policies underlie the conferment of immunity *ratione materiae* in international law. First, this type of immunity constitutes (or, perhaps more appropriately, gives effect to) a substantive defence, in that it indicates that the individual official is not to be held legally responsible for acts which are, in effect, those of the state. Such acts are imputable only to the state and immunity *ratione materiae* is a mechanism for diverting responsibility to the state.¹⁶⁵

Secondly, Akande and Shah maintain that the immunity of state officials in foreign courts prevents the circumvention of the immunity of the state through proceedings brought against those who act on behalf of the state. In this sense, they argue that the immunity operates as a jurisdictional or procedural bar and prevents courts from indirectly exercising control over the acts of the foreign state through proceedings against the official who carried out the act.¹⁶⁶

On the other side of the divide, Currie and Rikhof, for example, argue that state immunity, whether functional or personal, is procedural in nature. For them, immunity does not relieve an individual from substantive legal responsibility, but simply prevents a court from adjudicating.¹⁶⁷

¹⁶³ See, e.g., Fox, Hazel, “*Functions of State Officials and the Restrictive Rule of State Immunity*”, op cit, note 161 at 131.

¹⁶⁴ Ibid.

¹⁶⁵ Akande & Shah, op cit, note 20 at 826.

¹⁶⁶ Ibid at 827.

¹⁶⁷ Currie & Rikhof, op cit, note 5 at 83.

It appears that relevant judicial decisions have endorsed the position that state immunity (both in civil and criminal proceedings) operates as a procedural bar and not a substantive defence. In the *ICJ Arrest Warrant Case*, for example, the ICJ states as follows:

... immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they may enjoy impunity in respect of any crimes that they may have committed, irrespective of the gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar criminal prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.¹⁶⁸

In similar and much clearer language, the European Court of Human Rights (ECtHR) held in *Al-Adsani v United Kingdom*¹⁶⁹ that “[t]he grant of [state] immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national court’s power to determine the right.”

Again, in *Jones v Ministry of Interior of the Kingdom of Saudi Arabia*¹⁷⁰, the UK House of Lords maintained this position by holding, inter alia, that:

*State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law*¹⁷¹; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite.

It seems that the better view is that the state immunity rule operates as a procedural bar, and not as a substantive defence. This is because state immunity is raised to preclude a court seized of a case from entertaining the substance of the case, while a substantive defence is considered after the court’s treatment of the substance of a case. Again, immunity is raised to

¹⁶⁸ Supra, note 45 at para 60.

¹⁶⁹ *Al-Adsani v United Kingdom* [2001] ECHR 752 at para 48.

¹⁷⁰ [2006] UKHL 26 at para 24, per concurring judgment of Lord Hoffman.

¹⁷¹ Emphasis supplied.

deny the court jurisdiction, while a substantive defence is pleaded to exonerate a party that has either admitted the commission of some alleged wrongdoing or been found guilty of same by the court. Thus, immunity operates to shield from trial or prosecution, while a substantive defence seeks to vindicate from guilt or mitigate sanctions. A strong support for this position can be found in a recent ICJ judgment. In the *ICJ Jurisdictional Immunities Case*¹⁷², the World Court addressed the issue as follows: “... the law of immunity is essentially procedural in nature It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful”

Having discussed the nature of the state immunity rule under the present sub-heading, it becomes necessary to examine the possible grounds upon which the application of this rule could be justified. Thus, the next sub-heading deals with various rationales for state immunity in international law.

2.9 Waiver of State Immunity

A state to which the benefit of immunity accrues can, nevertheless, waive the said immunity or that of its high-ranking official. This waiver may be either express or implied.¹⁷³

An express waiver may occur upon submission to the jurisdiction of a foreign court either by a prior written agreement or after a particular dispute has arisen. It could be by a clear and express language in a contract agreement.¹⁷⁴ For an implied or deemed waiver, a state is deemed to have submitted to the jurisdiction of a foreign court where the state has instituted proceedings

¹⁷² Supra, note 31 at 124, para 58.

¹⁷³ See Tomuschat, Christian, “*The International Law of State Immunity and Its Development by National Institutions*”, op cit, note 35 at 1122-1123.

¹⁷⁴ See e.g., UK’s *State Immunity Act*, supra, note 8, s 2; US’ *Foreign Sovereign Immunities Act*, supra, note 8, s 1605.

or has intervened, or has taken steps in proceedings before such a court.¹⁷⁵ A submission to proceedings is also deemed a submission to any counter-claim arising out of the same legal relationship or facts as the main claim.¹⁷⁶ Furthermore, a state which has agreed in writing to submit a dispute to arbitration under the laws of a foreign state is not immune from proceedings in the courts of the foreign state in respect of the arbitration.¹⁷⁷

In criminal proceedings, since the immunity enjoyed by a foreign state official before the municipal courts of the forum state belongs to the official's state and not to the official individually¹⁷⁸, the official's state may decide to waive this immunity. If the immunity is so waived, the official cannot claim it on his own but is liable to face the proceedings before the forum state.¹⁷⁹ However, waiver of immunity in criminal proceedings is a very rare occurrence.

It appears that if a state ratifies a treaty that provides for exercise of jurisdiction over an international crime by national courts, the municipal courts of other states parties may exercise jurisdiction over high-ranking officials of the ratifying state in disregard of the state immunity rule. How express this waiver via treaty must be, however, has been a matter of contention.¹⁸⁰ In the *Pinochet* case¹⁸¹, a majority of the House of Lord viewed Chile's ratification of the *Torture Convention*¹⁸² as negating any claims to immunity *ratione personae* by Chilean officials. Lord Saville held that:

¹⁷⁵ UK's *State Immunity Act*, supra, note 8, s 2(5); *European Convention on State Immunity*, supra, note 8, art 1; *UN Jurisdictional Immunities Convention*, supra, note 8, art 8.

¹⁷⁶ *European Convention on State Immunity*, supra, note 8, art 1.

¹⁷⁷ *Ibid*, art 12; *UN Jurisdictional Immunities Convention*, supra, note 8, art 17.

¹⁷⁸ *ICJ Arrest Warrant Case*, supra, note 45 at 21, para 53.

¹⁷⁹ See, e.g., Franey, Elizabeth Helen, "*Immunity, Individuals and International Law: Which Individuals are Immune from the Jurisdiction of National Courts?*" (PhD Thesis, Department of Law, London School of Economics and Political Science, London, UK, June 2009) [unpublished] at 204.

¹⁸⁰ See Forcese, Craig, "*De-immunizing Torture: Reconciling Human Rights and State Immunity*" (2007) 52 McGill LJ 127 at 147.

¹⁸¹ Supra, note 52 at 163-170.

¹⁸² 1984, 1465 UNTS 85.

It is also said that any waiver by states of immunities must be express, or at least unequivocal. I would not dissent from this as a general proposition, but it seems to me that the express and unequivocal terms of the Torture Convention fulfill any such requirement. To my mind these terms demonstrate that the states who have become parties have clearly and unambiguously agreed that official torture should now be dealt with in a way which would otherwise amount to an interference in their sovereignty¹⁸³

Specifically, it may be stated that if the home state of the official fails to notify the forum state of the official's immunity, this may constitute a waiver of such official's immunity before the municipal courts of the forum state. This position appears to follow from the ICJ's position in the *Case Concerning Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)*¹⁸⁴. In this case, the ICJ suggested that, in the case of functional immunity, it is for the official's home state to notify the state seeking to exercise jurisdiction and that the latter is not obliged to raise or consider the matter of its own accord.

2.10 Conclusion

By way of necessary background, the foregoing discussion has attempted an overview of the significance, history, nature, and rationales for the state immunity rule. It has also examined the entities entitled to its protection, as well as the types of state immunity available to state officials. Consequently, this thesis will proceed in the next chapter to an exposition of various problems arising from the application of this rule in the international criminal justice system.

¹⁸³ *Pinochet* case, *supra*, note 52 at 170.

¹⁸⁴ (2008) ICJ Reps 177 at paras 194-197.

CHAPTER 3

APPLICATION OF THE STATE IMMUNITY RULE IN THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM: PROBLEMS ARISING

3.1 Introduction

Chapter 2 of this thesis has, inter alia, examined the rationales advanced for the state immunity rule. Despite the commendable nature of these rationales, the rule's application in the international criminal justice system gives rise to a number of problems which substantially undermine its value. These problems, which range from impunity for flagrant violation of peremptory norms of international law to perpetuation of injustice, are examined below.

3.2 Impunity for Flagrant Violation of Peremptory Norms of International Law

In contemporary international law, certain norms are so fundamental that they have attained the status of “*peremptory norms*” or “*jus cogens*”. These norms cannot, therefore, be derogated from by any entity – sovereign states, state officials, or private persons. The *Vienna Convention on the Law of Treaties*¹ defines a “*peremptory norm*” as follows:

... a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.²

Among these peremptory norms³ are the international prohibitions on the commission of some heinous international crimes. These crimes are prohibited both under customary

¹ 1969, 1155 UNTS 339, art 53.

² See also Costello, Daniel G, “*Political Constructivism and Reasoning about Peremptory Norms of International Law*” (2011) 4:1 WUJR 1 at 2; Criddle, Evan J & Evan Fox-Dent, “*A Fiduciary Theory of Jus Cogens*” (2009) 34:2 YJIL 331 at 331-332; Orakhelashvili, Alexander, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2009); De Wet, Erika, “*Jus Cogens and Obligations Erga Omnes*”, in Shelton, Dinah (ed), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013) 541 at 541-548.

³ See further the *Barcelona Traction, Light and Power Co Ltd case (Belgium v Spain)* (1970) ICJ Reps 32 (“*Barcelona Traction case*”). See also Cassese, Antonio, *International Law*, 2nd ed (Oxford: Oxford University

international law and international treaties.⁴ A *jus cogens* rule is widely accepted as having a superior status to other international law rules that have not attained a *jus cogens* quality. In the event of a conflict, it takes supremacy over these other rules as described here. First, when a rule of *jus cogens* is shown to be in conflict with a rule of ordinary international law relative to some specific case or state of affairs, the former shall prevail. Second, when a rule of *jus cogens* is shown to be in conflict with a treaty or a single treaty provision, the treaty or the single provision – if severable from the remainder of the treaty – shall be considered void. Third and more significantly, when a rule of *jus cogens* is shown to be in conflict with a rule of ordinary customary international law, the customary rule shall be considered void.⁵

Press, 2005) at 202-203; Bianchi, Andrea, “*Human Rights and the Magic of Jus Cogens*” (2008) 19:3 EJIL 491 at 493-494; Vidmar, Jure, “*Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?*”, in De Wet, Erika & Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford: Oxford University Press, 2012) 13 at 26 and 29. Caplan, Lee M, “*State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*” (2003) 17:4 AJIL 741; McGregor, Lorna, “*State Immunity and Jus Cogens*” (2006) 55 ICLQ 437.

⁴ These crimes include torture, genocide, war crimes, crimes against humanity, slavery and slave trade, and piracy. See the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984, 1465 UNTS 85 (“*Torture Convention*”); *Convention on the Prevention and Punishment of the Crime of Genocide*, 1948, 78 UNTS 277 (“*Genocide Convention*”); *Convention against Slavery*, 1926, 60 LNTS 253; *UN Convention on the Law of the Sea*, 1982, 1833 UNTS 3, art 105; *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1949, 75 UNTS 31 (“*Geneva Convention I*”); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, 1949, 75 UNTS 85 (“*Geneva Convention II*”); *Geneva Convention Relative to the Treatment of Prisoners of War*, 1949, 75 UNTS 135 (“*Geneva Convention III*”); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1949, 75 UNTS 287 (“*Geneva Convention IV*”); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 1977, 1125 UNTS 3 (“*Protocol I to the Geneva Conventions*”); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 1977, 1125 UNTS 609 (“*Protocol II to the Geneva Conventions*”); *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 1968, UN Doc A/7218. Other peremptory norms include the inviolability of the territorial integrity and political independence of a sovereign state and the prohibition on commission of the crime of apartheid. See the *Charter of the United Nations*, 1945, 1 UNTS XVI (“*UN Charter*”), art 2(4) and the *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 1973, 1015 UNTS 243 (“*Apartheid Convention*”), respectively.

⁵ See, e.g., Thirlway, Hugh, *The Sources of International Law* (Oxford: Oxford University Press, 2014) at 155; “*Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*”, Report of the Study Group of the International Law Commission, Chaired by Martti Koskenniemi, Report of the International Law Commission on the Work of Its 58th Session, 1 May – 9 June and 3 July – 11 August 2006, A/CN.4/L.682 at 149, 155-156; Linderfalk, Ulf, “*The Effect of Jus Cogens Norms: Whoever Opens Pandora’s Box, Did You Ever Think About the Consequences*” (2007) 18:5 EJIL 853 at 854. Vidmar, Jure, op cit, note 3 at 28-30.

Of special note is the fact that the rule of state immunity in international law has not attained *jus cogens* status. In fact, it is universally accepted that the state immunity rule is inferior to *jus cogens* rules in the hierarchy of international law norms.⁶ According to the normative hierarchy theory, international law norms are of different hierarchies, depending on how fundamental their nature may be. Thus, when a higher international legal norm (*jus cogens*) conflicts with a lower norm, the higher norm prevails.⁷ On this ground, it would logically follow that where there is a conflict between the state immunity rule and the *jus cogens* constituted by the prohibition on any of the foregoing international crimes, the state immunity rule should give way. It could, therefore, be argued in this regard that, at least, the courts of various states should apply the theory that a violation of *jus cogens* norm constitutes an implicit waiver of state immunity.⁸

However, the reality today is that under international law, foreign state immunity with respect to acts committed in the exercise of official powers seems to remain the rule, even when these acts are committed in violation of a norm which has the character of *jus cogens*.⁹ In the *ICJ Jurisdictional Immunities Case*¹⁰, for example, Italy argued, inter alia, that the massacres carried out by German armed forces in Greece amounted to breaches of international humanitarian law

⁶ Knuchel, Sevrine, “*State Immunity and the Promise of Jus Cogens*” (2011) 9:2 NJIHR 149 at 153; Orakhelashvili, Alexander, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2008) at 320-358; Caplan, Lee M, “*State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*”, op cit, note 3; McGregor, Lorna, “*State Immunity and Jus Cogens*”, op cit, note 3.

⁷ See Shelton, Dinah, “*Normative Hierarchy in International Law*” (2006) 100:2 AJIL 291; Linderfalk, Ulf, “*Normative Conflicts and the Fuzziness of the International Jus Cogens Regime*” (2009) 69 ZaoRV 961; Vidmar, Jure, op cit, note 3.

⁸ Johnson, Thora A, “*A Violation of Jus Cogens Norms as an Implicit Waiver of Immunity under the Federal Sovereign Immunities Act*” (1995) 19:4 Maryland JIL 259 at 260-261.

⁹ See *Case Concerning the Arrest Warrant of 11 April, 2000 (Democratic Republic of Congo v Belgium)* (2002) ICJ Reps 3 (“*ICJ Arrest Warrant Case*”); *Jurisdictional Immunities of the State Case (Germany v Italy: Greece intervening)* (2012) ICJ Reps 99 (“*ICJ Jurisdictional Immunities Case*”); Krajewski, Markus and Christopher Singer, “*Should Judges be Front-Runners?: The ICJ, State Immunity and the Protection of Fundamental Human Rights*” (2012) 16 Max Planck UNYB I at 22; Knuchel, Sevrine, op cit, note 12 at 154; Potesta, Michele, “*State Immunity and Jus Cogens Violations: The Alien Tort Statute Against the Backdrop of the Latest Developments in the ‘Law of Nations’*” (2010) 28:2 Berkeley JIL 571 at 576.

¹⁰ Supra, note 9.

and, therefore, violations of *jus cogens*. For Italy, these violations displaced the applicability of any rule of immunity for Germany before Italian and other foreign courts. However, the ICJ rejected this argument, holding that even if the acts of the German armed forces involved violations of *jus cogens* rules, the applicability of the customary international law on state immunity was not affected.¹¹

The implication of this practice in the international criminal justice system is the creation of a culture of impunity in high-ranking state officials as regards the violation of these peremptory norms.¹² Even the UN official definition of the word “*impunity*” shows that state immunity is the principal cause of impunity among perpetrators of international crimes. For example, the *preamble* to the UN Economic and Social Council’s *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*¹³ defines “impunity” thus:

“Impunity” means the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - *since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.*¹⁴

According to *principle 1* of these *Principles*,

Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.

¹¹ Ibid at 142, para 97.

¹² See, e.g., The Redress Trust, *Immunity v. Accountability: Considering the Relationship between State Immunity and Accountability for Torture and Other Serious International Crimes* (London: The Redress Trust, 2005) at 44.

¹³ E/CN.4/2005/102/Add.1, preamble.

¹⁴ Emphasis supplied.

The various forms of violations of *jus cogens* norms arising from the application of the state immunity rule in the international criminal justice system are discussed below.

3.2.1 Systematic Commission of International Crimes

In international law, certain acts are outlawed as crimes against the international community as a whole. These, as referred to above, include genocide, war crimes, crimes against humanity, torture, and the crime of aggression.¹⁵ Consequently, universal international treaties have been concluded that expressly prohibit and punish these crimes. States have, over the years, universally accepted prohibitions on the commission of these crimes without objection. By virtue of this universal state practice and *opinio juris*¹⁶, these crimes are outlawed under customary international law binding on all states and individuals. Also, because of their non-derogable nature, the prohibition on these crimes has attained the status of *jus cogens*.¹⁷

Perpetrators of these crimes are regarded under customary international law as “*hostes humani generis*” (enemies of all humankind), whom all states have an obligation *erga omnes* (owed to the whole world community) to bring to justice.¹⁸ Consequently, the principle of universal jurisdiction was developed in international criminal law. By virtue of this principle, all states have jurisdiction to prosecute these international crimes. This jurisdiction is exercised

¹⁵ See note 4, *supra*.

¹⁶ *Opinio juris sive necessitatis* (shortened as “*opinio juris*”) means the belief that a certain practice or behaviour observed by states constitutes law. It is the psychological element which, together with state practice, forms a rule of customary international law. See, e.g., Shaw, Malcolm N, *International Law*, 6th ed (Cambridge: Cambridge University Press, 2008) at 84.

¹⁷ See Bassiouni, M Cherif, “*International Crimes, Jus Cogens and Obligation Erga Omnes*” (1996) 59:4 Law and Contemporary Problems 63 at 65; De Hoogh, Andre, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (The Hague: Kluwer Law International, 1996) at 45-63.

¹⁸ Gaja, Giorgio, “*Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts*”, in Weiler, Joseph et al (eds), *International Crimes of State: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility* (Berlin: Walter de Gruyter & Co, 1988) 151; Sriram, Chandra L, *Globalizing Justice for Mass Atrocities: A Revolution in Accountability* (London: Routledge, 2005) at 15.

irrespective of whether the crimes are committed in the prosecuting state's territory, and regardless of the accused person's nationality, state of residence, or any other relationship with the prosecuting state.¹⁹ Under this principle, the prosecuting state justifies its claim to jurisdiction on the grounds that these crimes are committed against all and against the very foundation of the international community and are, therefore, too serious to tolerate.²⁰ This universal jurisdiction under customary international law is complemented by multilateral treaties for some crimes, e.g., genocide²¹, war crimes²², and torture²³.

Despite the international prohibition and the conferment of universal jurisdiction on the courts of all states to try and punish the perpetrators, state immunity still continues to bar trials of high-ranking state officials for these crimes before foreign national courts. For example, in the *Application for Arrest Warrant against Robert Mugabe*²⁴ (“*Re Mugabe*”), a UK High Court held that a warrant could not be issued in the UK for the arrest of Mr. Robert Mugabe (the Zimbabwean President) on charges of international crimes. This decision, according to the court, was based on the grounds that he was a serving head of state at the time the proceedings were brought. A similar decision was reached by a UK Magistrate's Court in the *Application for Arrest Warrant against General Shaul Mofaz*²⁵ (“*Re Mofaz*”). Here, the court rejected, on grounds of state immunity, an application for a warrant for the arrest of General Mofaz (then

¹⁹ Hesenov, Rahim, “*Universal Jurisdiction for International Crimes – A Case Study*” (2013) 93:3 Eur J Crim Policy Res 275 at 275; Zemach, Ariel, “*Reconciling Universal Jurisdiction With Equality Before the Law*” (2011) 47: Texas ILJ 143 at 145; Lafontaine, Fannie, “*The Unbearable Lightness of International Obligations: When and How to Exercise Jurisdiction under Canada's Crimes Against Humanity and War Crimes Act*” (2010) 23:2 Revue Québécoise de Droit International 1 at 2.

²⁰ D'Aspremont, Jean, “*Multilateral versus Universal Exercises of Universal Criminal Jurisdiction*” (2010) 43 Israel LR 301 at 302-303; Amnesty International's *Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction*, Amnesty International May 1999AI Index: IOR 53/01/99 at 1.

²¹ See the *Genocide Convention*, supra, note 4.

²² *Geneva Conventions I-IV*, supra, note 4.

²³ *The Torture Convention*, supra, note 4.

²⁴ Reported in Warbrick, Collin, “*Public International Law: I. Immunity and International Crimes in English Law*” (2004) 53:3 ICLQ 769.

²⁵ Ibid at 771

Israeli defence minister) in relation to allegations of torture and war crimes. In *Re Gaddafi*²⁶, the former Libyan head of state (Muammar Gaddafi) was charged in France with multiple murder for his complicity in a terrorist action (in circumstances that also amounted to crimes against humanity). The French Cour de Cassation, however, declined jurisdiction and dismissed the case on the basis of the state immunity rule.²⁷

Also, in *Re Sharon & Yaron*²⁸, a number of survivors of the 1982 massacre in Sabra and Shatila Palestinian refugee camps (Lebanon) lodged a criminal complaint with a Belgian court. The complaint was against Ariel Sharon (Israeli defence minister at the time of the massacre and Prime Minister at the time of the complaint) and Amos Yaron (commander of an Israeli army unit at the gates of the refugee camps). The complaint accused the two Israeli officials of genocide, crimes against humanity and war crimes. However, the Belgian Cour de Cassation dismissed the complaint against Sharon on grounds of immunity.²⁹

As well, in the *Re Castro*³⁰, the Spanish Audiencia Nacional dismissed, on grounds of state immunity, international criminal proceedings against Fidel Castro (former Cuban President) in Spain. Also, in *Re Kagame*³¹, the same Spanish Audiencia Nacional dismissed, on grounds of state immunity, criminal charges leveled against Paul Kagame (the incumbent Rwandan Prime Minister) for genocide and other species of international crimes.

²⁶ Arrêt no. 1414, (2001) 125 ILR 456.

²⁷ This decision has been criticized in many quarters due, inter alia, to the court's inability to draw a clear distinction between immunity *ratione personae* and immunity *ratione materiae*. See, e.g., Zappala, Salvatore, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes: The Gaddafi Case Before the French Cour de Cassation" (2001) 12:3 EJIL 595; Cassese, Antonio et al, *International Criminal Law: Cases and Commentary* (Oxford: Oxford University Press, 2011) at 91.

²⁸ (2003) 42 ILM 596 (Judgment of 12 February 2003).

²⁹ See further details of the court's decision in Cassese, Antonio et al, op cit, note 27 at 92-93.

³⁰ Cited in Harrington, Joanna et al (eds), *Bringing Power to Justice? The Prospects of the International Criminal Court* (Montreal, Canada: McGill-Queen's University Press, 2006) at 79.

³¹ Auto del Juzgado Central Instruccion No. 4 (Spain, Audiencia Nacional 2008).

The decision of the ICJ in the *ICJ Arrest Warrant Case*³² essentially encourages this culture of impunity. Here, the ICJ held that serving heads of state, heads of government and foreign ministers enjoy a broad personal immunity from the jurisdiction of foreign domestic courts, including immunity from prosecution for international crimes. The court made it clear that such immunity subsists even where it is alleged that an international crime has been committed.³³ It should be noted that many of the national courts that dismissed the foregoing cases against heads of state and heads of government³⁴ on grounds of state immunity actually did so in the footsteps of this ICJ decision, i.e., on the grounds that immunity *ratione personae* absolutely bars foreign criminal proceedings.³⁵ The ICJ may be right in this case, in view of its limited ability, i.e., the fact that it does not create customary international law, but finds it in state practice.³⁶

However, one of the major problems arising from the application of the state immunity rule in such circumstances is that state officials perpetrating or intent on perpetrating these crimes are emboldened to do so. Some of them are shielded from criminal prosecutions in their states' domestic courts by the executive immunity provisions of their states' municipal constitutions and amnesty laws.³⁷ Even in states where there are no such municipal constitutional immunity and/or amnesty laws, the fact that these officials are in control of the government apparatuses of their states makes it extremely difficult for charges of international crimes to be

³² Supra, note 9.

³³ The ICJ subsequently reaffirmed its judgment (as regards heads of state) in *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)* (2008) ICJ Reps 177.

³⁴ E.g., *Re Sharon & Yaron*, supra, note 28; *Re Mugabe*, supra, note 24; and, *Re Kagame*, supra, note 31.

³⁵ See Foakes, Joanne, "Immunity for International Crimes?: Developments in the Law on Prosecuting Heads of State in Foreign Courts" (2011) Chatham House Briefing Paper, November 2011, IL BP 2011/02 1 at 4.

³⁶ *Statute of the International Court of Justice*, 1945, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; (1945) 39 AJIL Supp 215 ("ICJ Statute"), art 38(1)(b).

³⁷ E.g., the *Constitution of the Federal Republic of Nigeria*, 1999, LFN 2004, Cap C23, s 308.

pressed against them domestically.³⁸ A further exemption of these officials from international criminal proceedings before foreign courts by the state immunity rule, therefore, produces no deterrence and defeats the ends of the international criminal justice system. To this extent, I agree with Antonio Cassese when he states that:

It is state officials . . . that commit international crimes They order, plan, instigate, organize, aid and abet, or culpably tolerate or acquiesce, or willingly or negligently fail to prevent or punish international crimes To allow these state agents go scot-free only because they acted in an official capacity . . . would mean to bow to traditional concerns of the international community (chiefly, respect for state sovereignty). In the present international community respect for human rights and the demand that justice be done whenever human rights have been seriously and massively put in jeopardy, override the traditional principle of respect for state sovereignty. The new thrust towards the protection of human dignity has shattered the shield that traditionally protected state agents.³⁹

Consequent upon the above judicial practice, these crimes continue to be committed without any fear of punishment, at least from foreign courts' exercise of jurisdiction. In the words of Osita Nnamani Ogbu, "the doctrine of sovereign immunity gave rise to sovereign impunity as it shields sovereigns from being answerable for their crimes in international law."⁴⁰ No doubt, the rule is one of the norms that sustains mutual respect and cordial relations among states and thus maintains relative peace and balance of power in the international society. However, the high level of impunity it induces in state officials regarding commission of these crimes undermines its positive roles.

³⁸ See Foakes, Joanne, "*Immunity for International Crimes?: Developments in the Law on Prosecuting Heads of State in Foreign Courts*", op cit, note 35 at 4.

³⁹ Cassese, Antonio, *International Criminal Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 307-308.

⁴⁰ Ogbu, Osita N, "*The International Criminal Court and Crimes Against Humanity*" (2006) 4 IULJ 114 at 117. See also UN General Assembly, "*Immunity of State Officials Remains at Issue as legal Committee Ends Review of International Law Commission Report*", 4 November 2011, GA/L/3428, also online: <<http://www.un.org/News/Press/docs/2011/gal3428.doc.htm>>; Fox, Hazel & Philippa Webb, *The Law of State Immunity*, 3rd ed (Oxford: Oxford University Press, 2013) at 318.

How this immunity-induced impunity, and the sense of security that goes with it, manifests regarding a number of international crimes is set out below. The specific crimes discussed seriatim are torture, genocide, war crimes and crimes against humanity.

3.2.1.1 Torture

As noted earlier, torture is an international crime prohibited by the *Torture Convention*⁴¹. Articles 5 to 7 of the *Convention* provide for some limited form of universal jurisdiction by conferring on the contracting states jurisdiction to prosecute or extradite to another state an alleged torturer found within their respective territories. These provisions supplement the established position that torture has become a crime under customary international law and is, therefore, susceptible to universal jurisdiction by the domestic courts of all states. In *R v Bow Street Metropolitan Stipendiary Magistrates, ex parte Pinochet Ugarte (No. 3)*⁴² (“Pinochet case”) for example, counsel for the appellants maintained that systematic torture is to be considered a violation of *jus cogens*. For the counsel⁴³:

In showing an international intention to prohibit an express practice, such as torture, it is not necessary that each country prohibits it in the same way, nor is it necessary that each state’s law prohibits torture wherever it occurs. *The various laws of states considered in the light of the fact that every recent human rights treaty has prohibited torture provide evidence that customary international law prohibited torture before the Torture Convention and that, under customary international law, torture was an international crime if committed by a public official. There was no head of state exception and states other than the state where the offence took place were entitled to exercise jurisdiction.*⁴⁴ The Torture Convention codified existing customary law norms prohibiting torture, but added a duty to

⁴¹ Supra, note 4. Article 1 of the *Convention* defines torture as the infliction of severe physical or mental pain or suffering for some specified purposes by, or at the instigation of, or with the acquiescence of a public officer or other person acting in an official capacity. See also Marchesi, Antonio, “*Implementing the UN Convention Definition of Torture in National Criminal Law (with Reference to the Special Case of Italy)*” (2008) 6 JICJ 195; Rodley, Nigel S, “*The Definition(s) of Torture in International Law*” (2002) 55 Current Legal Problems 467.

⁴² (2000) 1 AC 147.

⁴³ Ibid at 156, paras A-E.

⁴⁴ Emphasis supplied.

exercise the jurisdiction which existed under customary international law. No signatory to that Convention can object to the exercise of the jurisdiction by another state as being an interference with the signatory's internal affairs. *Accordingly, either the Torture Convention establishes that the applicant can have no immunity from prosecution for acts of torture or alternatively the prohibition against torture has the status of jus cogens and he can be prosecuted under customary international law....*⁴⁵ If it is necessary to show that torture was a crime under international law in 1973 when the acts occurred that requirement is satisfied because it was a crime under customary international law at that time....

In the American case of *Siderman de Blake v Republic of Argentina*⁴⁶, the US Federal Court held that alleged acts of official torture committed in 1976 before the conclusion of the *Torture Convention* violated international law because the prohibition of official torture had attained the status of *jus cogens*.

Notwithstanding this elevated status of the international legal norm against torture, some domestic and international judicial bodies and other relevant authorities still uphold the supremacy of state immunity over this peremptory norm prohibiting torture. In *Re Rumsfeld*⁴⁷, the General Prosecutor of Paris, for example, dismissed a criminal complaint filed in France against Donald Rumsfeld (a former US Defence Secretary). The complaint accused Rumsfeld of torture and authorizing interrogation techniques that led to serious human rights abuses. The grounds for the complaint were allegations by Iraqi prisoners at the Abu Ghraib Jail in Iraq, and by prisoners at the US detention camp in Guantanamo Bay, Cuba, of physical abuse and sexual humiliation by US soldiers under Rumsfeld's command. This complaint was filed during Rumsfeld's visit to France. Despite the severity of these allegations, the Paris Prosecutors' Office dismissed the action, ruling that Rumsfeld benefitted from a "customary" immunity from

⁴⁵ Emphasis supplied.

⁴⁶ 965 F. 2d 699 (1992).

⁴⁷ 2007/09216/SGE; See also Centre for Constitutional Rights, "*French war Crimes Complaint Against Rumsfeld, et al.*", online: <<http://ccrjustice.org/ourcases/current-cases/french-war-crimes-complaint-against-donald-rumsfeld,-et-al.>>.

prosecution granted to heads of state and government and foreign ministers, even after they had left office. An appeal to the General Prosecutor of Paris was dismissed on the same grounds, despite the fact that Rumsfeld was no longer in office as Defence Secretary.⁴⁸ It could be argued that these rulings appear misleading. They fail to clearly state the type of immunity to which Rumsfeld was entitled in the circumstance. If the French authorities meant immunity *ratione personae*, he was no more a sitting state official and should, therefore, not have been entitled to it. If they meant immunity *ratione materiae*, the position had already emerged that torture does not qualify as an official act for which a state official will be entitled to immunity after leaving office.⁴⁹

Even in the *Pinochet* case⁵⁰, the UK House of Lords, while unprecedentedly disregarding the immunity of a former head of state for serious international crimes, nevertheless held that a head of state is still protected while in office by immunity even in respect of serious international crimes. According to the Law Lords, a serving head of state can still claim immunity *ratione personae* if charged for torture. For the House of Lords, the nature of the charge is irrelevant: the official's immunity is personal and absolute.⁵¹ No doubt, this is a correct statement of the customary international law position. However, the problems that could emanate from it and similar decisions in other cases are subsequently discussed.

In the *ICJ Arrest Warrant Case*⁵², Belgium had passed a law conferring on its courts universal jurisdiction over international crimes committed by anyone anywhere (even if the perpetrator was not present in Belgium) and denying all immunities for such crimes. Pursuant to

⁴⁸ See also Doddie, A et al (ed), "*French Prosecutors Throw out Rumsfeld's Torture Case*", online: <<http://www.reuters.com/article/politicsNews/idUSL2381695200071123>>.

⁴⁹ See the *Pinochet* case, *supra*, note 42.

⁵⁰ *Ibid.*

⁵¹ See also Sawma, Gabriel, "*The Immunity of Heads of State under International Law*", online: <<http://www.gabrielawma.blogspot.com>>.

⁵² *Supra*, note 9.

this law, on April 11, 2000, a Belgian judge issued an international arrest warrant against Mr. Abdulaye Yerodia Ndobasi, who was at the time serving as the foreign affairs minister of the DRC. The warrant was, inter alia, on charges of torture, war crimes and crimes against humanity. Consequently, the DRC initiated judicial proceedings against Belgium in the ICJ. The DRC argued that Belgium's non-recognition of the immunity of a serving foreign affairs minister was a violation of international law.

By 13 votes to 3, the ICJ ruled that Belgium had violated a legal obligation toward the DRC. The court vehemently rejected Belgium's contention that, having regard to developments in contemporary international law, a serving foreign minister is not entitled to claim immunity before national courts on charges of international crimes. For the ICJ, immunity before national courts was not affected by the existence of treaties such as the *Torture Convention*. The court finally held that Belgium had failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent DRC foreign minister enjoyed under international law.⁵³ In its words⁵⁴:

The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. *It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity....*⁵⁵ It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply

⁵³ Ibid at 33, para 78(2). See also Kochler, Hans, "The Judgment of the International Court of Justice (2002) and its Implications for the Exercise of Universal Jurisdiction by National Courts: The Case of Belgium", in Kochler, Hans (ed), *Global Justice or Global Revenge? International Criminal Justice at the Crossroads* (Wien, Germany: Springer-Verlag, 2003) 85; Frulli, Micaela, "The ICJ Judgment on the Belgium v. Congo Case (14 February 2002): A Cautious Stand on Immunity from Prosecution for International Crimes" (2002) 3:3 German LJ 1, also online: <<http://www.germanlawjournal.com/index.php?pageID=11&artID=138>>.

⁵⁴ *ICJ Arrest Warrant Case*, supra, note 9 at 24-25, paras 58-59.

⁵⁵ Emphasis supplied.

jurisdiction. Thus, *although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign state, even where those courts exercise such a jurisdiction under these conventions.*⁵⁶

With a view to justifying this legal position, the ICJ gave reasons why the absolute immunity and inviolability of a foreign minister for international crimes before national courts should not be seen as leading to impunity:

*The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity.*⁵⁷ Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be

⁵⁶ Emphasis supplied. See also Cassese, Antonio et al, *International Criminal Law: Cases and Commentary*, op cit, note 27 at 88, 93, 95-96; Wirth, Steffen, "Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium Case*" (2002) 13:4 EJIL 877; Wouters, Jan & Leen De Smet, "The ICJ's Judgment in the Case Concerning the *Arrest Warrant of 11 April 2000*" (2004) 4 YIHL 373.

⁵⁷ Emphasis supplied.

subject to criminal proceedings before certain international criminal courts, where they have jurisdiction....⁵⁸

However interesting the ICJ's reasons may seem on their face, these reasons, in reality, appear unsound and unconvincing and have the potential to lead to the impunity the court is trying to avoid. Regarding the first and second reasons, it is obvious that in some states, these state officials are in absolute control of government apparatuses. Besides, international crimes are often committed by state officials as part of state policy, and so governments do not routinely prosecute their own officials engaged in the implementation of such policies.⁵⁹ Consequently, the idea of their prosecution for these international crimes in their home courts is far-fetched, as no one would incriminate or punish himself. Besides, it should be noted that in many states, there exist domestic constitutional immunities, amnesties and allied laws barring criminal prosecution of sitting high-ranking state officials.⁶⁰ Similarly, the option of waiver of immunity in such a circumstance would amount to the officials deliberately handing themselves over to foreign states for international criminal prosecution. This, again, amounts to expecting the impossible.

In respect of the ICJ's third reason (where officials cease holding office), it is obvious that in many states, some high-ranking officials to whom immunity *ratione personae* attaches could legitimately or illegitimately hold office for life.⁶¹ This is especially the case with many heads of state. For example, Queen Elizabeth II has been the UK head of state since 1952 and

⁵⁸ ICJ *Arrest Warrant Case*, supra, note 9 at 25, paras 60-61.

⁵⁹ See Akande, Dapo & Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (2010) 21:4 EJIL 815 at 816.

⁶⁰ Examples are Nigeria's *Constitution of the Federal Republic of Nigeria*, 1999, op cit, note 37, s 308; South Africa's *Promotion of National Unity and Reconciliation Act* [No 34, 1995] – G16579; also online: < http://www.saflii.org/za/legis/num_act/ponuara1995477/>.

⁶¹ See, e.g., Hassig, Ralph & Kongdan Oh, *The Hidden People of North Korea: Everyday Life in the Hermit Kingdom* (Maryland, USA: Rowman and Littlefield Publishers, 2009) at 17; Yom, Sean L & F Gregory Gause III, "Resilient Loyals: How Arab Monarchies Hang On" (2012) 23 *Journal of Democracy* 74; Brownlee, Jason et al, "Why the Modest Harvest", in Diamond, Larry & Marc F Plattner (eds), *Democratization and Authoritarianism in the Arab World* (Maryland, USA: Johns Hopkins University Press, 2014) 127 at 139; Svobik, Milan W, *The Politics of Authoritarian Rule* (Cambridge: Cambridge University Press, 2012).

will most likely remain so for life.⁶² Robert Mugabe's presidency in Zimbabwe since 1980 has no end in sight, just like Yoweri Museveni's in Uganda since 1986, Paul Biya's in Cameroon since 1982, Jose Eduardo Dos Santos' in Angola since 1979, and Teodoro Obiang Nguema's in Equatorial Guinea since 1979.⁶³ Another example is Kim Jong-Un who, in 2011, succeeded his father Kim Jong-Il and his grandfather Kim Il-Sung (both of whom died in office). As head of state of the Democratic Republic of Korea, Kim Jong-Un is meant to remain in this position for life.⁶⁴ Bashar al-Assad, in 2000, also succeeded his father, Hafez al-Assad, as the President of Syria and has no plan to quit, despite national and international pressure to do so.⁶⁵ There are also many other examples, past and present.⁶⁶ According to Joanne Foakes, "It is notable that not all republics have heads of State who are elected. Some have Presidents who hold office 'for life' and, in some cases, even where some form of constitutional election or appointment is ostensibly applied, it is clear that there is a degree of de facto inheritance or dynastic continuity in the succession of one head of state to another."⁶⁷

Finally, on the ICJ's fourth reason (prosecution before international criminal courts), contemporary realities show that due to the interplay of political, economic, logistic, and

⁶² Thorpe, DR, "*Queen Elizabeth and Her 12 Prime Ministers*", online: < <https://history.blog.gov.uk/2012/09/01/queen-elizabeth-and-her-twelve-prime-ministers/>>.

⁶³ My Continent Africa, "*Presidents for Life*", online: < <http://mycontinent.co/Ditactors.php>>.

⁶⁴ Grzelczyk, Virginie, "*In the Name of the Father, Son, and Grandson: Succession patterns and the Kim Dynasty*" (2012) 9:2 JNAH 33.

⁶⁵ See Foakes, Joanne, *The Position of Heads of State and Senior Officials in International Law* (Oxford: Oxford University Press, 2014) at 34; Svobik, Milan W, *The Politics of Authoritarian Rule* (Cambridge: Cambridge University Press, 2012).

⁶⁶ Marshall Tito of Yugoslavia became 'President for life' in 1963 and retained office until his death in 1980. The first President of Malawi (Dr. Hastings Banda) was to hold office 'for his lifetime' under article 9 of the Malawian Constitution but for constitutional reforms that forced him to retire in 1994. There is also the case of President Niyoz of Turkmenistan, who died in office in 2006. See Foakes, Joanne, *The Position of Heads of State and Senior Officials in International Law*, op cit, note 65 at 34. See also, Brownlee, Jason, "*Hereditary Succession in Modern Autocracies*" (2007) 59:4 World Politics 595.

⁶⁷ Foakes, Joanne, *The Position of Heads of State and Senior Officials in International Law*, op cit, note 65 at 34.

jurisdictional factors, international criminal courts may, in many cases, not be effective in trying high-ranking state officials, especially those of powerful states.⁶⁸

The reasons given by the ICJ in the *ICJ Arrest Warrant Case* in relation to the crime of torture generate the following questions: (1) Can the ICJ find this approach in custom or convention? (2) If immunity *ratione personae* should continue to shield state officials from prosecution for this crime, who, then, should be held responsible for the crime, when it is clear that the *Torture Convention*'s definition of "torture" envisages its commission by state officials? (3) What effect and respect would the peremptory norm against the commission of this international crime then command and how would it achieve its objective(s)? (4) How would the protection of the dignity of human beings, which is one of the principal aims of the United Nations, be accomplished? (5) Finally, what would serve as a deterrent to other high-ranking state officials intending to commit this crime in the future, when previous culprits were not subjected to any form of accountability? How safe are men and women all over the world in the hands of repressive state regimes and high-ranking officials?

It is, therefore, clear that if immunity *ratione personae* of high-ranking state officials from prosecutions for torture remains absolute even against international instruments that confer universal jurisdiction on torture and disregard immunity, the implication is that impunity over this crime would endlessly thrive. On this count, Judge Al-Khasawneh's dissenting opinion in the *ICJ Arrest Warrant Case*⁶⁹ is relevant. For this Judge⁷⁰:

⁶⁸ See, e.g., See Phooko, Moses Retselisitsoe, "How Effective the International Criminal Court Has Been: Evaluating the Work and Progress of the International Criminal Court" (2011) NDJICHL 182 at 194; Gegout, Catherine, "The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace" (2013)34:5 TWQ 800 at 808; Du Plessis, Max, "Universalizing International Criminal Law: The ICC, Africa and the Problem of Political Perceptions" (2013) 249 ISS Paper 1 at 1..

⁶⁹ Supra, note 9 at 95-99. See also McGregor, Lorna, "Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty" (2007) 18:5 EJIL 903.

⁷⁰ *ICJ Arrest Warrant Case*, supra, note 9 at 97-98, paras 5-7.

*A more fundamental question is whether high State officials are entitled to benefit from immunity even when they are accused of having committed exceptionally grave crimes recognized as such by the international community. In other words, should immunity become de facto impunity for criminal conduct as long as it was in pursuance of State policy?*⁷¹ The Judgment sought to circumvent this morally embarrassing issue by recourse to an existing but artificially drawn distinction between immunity as a substantive defence on the one hand and immunity as a procedural defence on the other.... *The effective combating of grave crimes has arguably assumed a jus cogens character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance. Therefore when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail.*⁷² Even if we are to speak in terms of reconciliation of the two sets of rules, this would suggest to me a much more restrictive interpretation of the immunities of high-ranking officials than the Judgment portrays. Incidentally, such a restrictive approach would be much more in consonance with the now firmly established move towards a restrictive concept of State immunity, a move that has removed the bar regarding the submission of States to jurisdiction of other States often expressed in the maxim *par in parem non habet imperium*. *It is difficult to see why States would accept that their conduct with regard to important areas of their development be open to foreign judicial proceedings but not the criminal conduct of their officials.*⁷³

Although this dissenting opinion may not accord with the law, it, arguably, accords much more with the ends of justice, the individual accountability mission of the international criminal justice system, and the fight against impunity in the system. The dissenting judgments of some of the UK House of Lords members in the earlier *Pinochet* case⁷⁴ also support this position. According to Lord Millet, for instance:

The definition of torture ... is in my opinion entirely inconsistent with the existence of a plea of immunity *ratione materiae*. The offence can be committed only by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is coextensive

⁷¹ Emphasis supplied.

⁷² Emphasis supplied.

⁷³ Emphasis supplied. See also the dissenting opinion of Judge ad hoc Van den Wyngaert at 137-187.

⁷⁴ *Supra*, note 42.

with the offence.... The international community had created an offence for which immunity *ratione materiae* could not possibly be available. International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose.

Obviously, Lord Millet's statement relates to immunity *ratione materiae*. However, it is arguable that the same position should be adopted regarding immunity *ratione personae*, especially in the light of the extreme impunity that this type of immunity creates in high-ranking state officials entitled to it. No doubt, this will be difficult to do, in view of states' tenacious desire to preserve the dignity of their incumbent high-ranking officials and to ensure continuity of their national governance.

However, stronger reasons exist against this position maintained by states. First, international crimes shock the conscience of all humanity and affect the very foundation of the international community as a whole. Thus, the dignity of a single culpable state official should not take supremacy over the welfare of all humanity and the peace and safety of the whole international community. Second, it may be possible in some states for high-ranking state officials to step down from their offices when charged with national crimes. Thus, there is no justification for such officials not to do so, at least temporarily, when charged with international crimes that shock all humanity and threaten the safety of the whole international community.

3.2.1.2 Genocide

From inception, the crime of genocide has always been recognized as of heinous magnitude in international law.⁷⁵ Francis Deng describes it as "one of the most heinous of

⁷⁵ Article 2 of the *Genocide Convention*, supra, note 4 defines genocide as a series of acts committed "with intent to destroy, in whole or in part, a national, ethnic, racial or religious group". See also Boister, Neil and Burchill, R, "*The Implications of the Pinochet Decisions for the Extradition or Prosecution of Former South African Heads of State*

international crimes against which all humanity must unite to prevent is reoccurrence and punish those responsible.”⁷⁶

Right from the end of the Second World War and the advent of the UN, relevant international legal instruments have expressly prohibited genocide and made it a serious crime with individual responsibility. These treaties include the *Genocide Convention*⁷⁷ and, recently, the *Rome Statute of the International Criminal Court*⁷⁸ (the “*Rome Statute*”). Besides, before the adoption of these treaties, the UN General Assembly, in 1946, had already affirmed that genocide is a crime bearing individual responsibility under customary international law.⁷⁹

Nowadays, it is universally accepted that the prohibition on genocide has not only become a rule of customary international law, but has also attained the status of *jus cogens*. In *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, *Jurisdiction and Admissibility, Judgment*⁸⁰, the ICJ clearly affirmed this position. In its words:

The Court will begin by reaffirming that the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation and that a consequence of that conception is the universal character both of the condemnation of genocide and of the co-operation required ‘in order to

for Crimes Committed under Apartheid” (1999) 11 AJICL (Pt. 4) 619 at 631-635; Prevent Genocide International, “The Crime of ‘Genocide’ Defined in International Law”, online: < <http://www.preventgenocide.org/genocide/officialtext.htm>>.

⁷⁶ Quoted in UN Office of the Special Adviser on the Prevention of Genocide, “*Genocide: The Deliberate and Systematic Extermination of an Ethnic, Racial, Religious or National Group*”, online: < http://www.un.org/en/preventgenocide/adviser/pdf/osapg_booklet_eng.pdf>; See also Gaeta, Paola, “*On What Conditions Can a State be Held Responsible for Genocide*” (2007) 18:4 EJIL 631 at 642.

⁷⁷ Supra, note 4.

⁷⁸ 1998, UN Doc A/CONF 183/9 (1998), 2187 UNTS 90, art 5.

⁷⁹ UN General Assembly Resolution on the Crime of Genocide, A/RES/96(1) of 11 December 1946.

⁸⁰ (2006) ICJ Reps 6 at 31-32, para 64. See also Gaeta, Paola, op cit, note 76 at 2; Ventura, Manuel J & Dapo Akande, “*Mothers of Srebrenica: The Obligation to Prevent Genocide and Jus Cogens – Implications for Humanitarian Intervention*”, EJIL: Talk!, September 6, 2013, online: < <http://www.ejiltalk.org/ignoring-the-elephant-in-the-room-in-mothers-of-srebrenica-is-the-obligation-to-prevent-genocide-jus-cogens/>>; Van Den Herik, Larissa, “*The Schism Between the Legal and the social Concept of Genocide in Light of the Responsibility to Protect*”, in Henham, Ralph & Paul Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Aldershot, England: Ashgate Publishing, 2007) 75 at 92.

liberate mankind from such an odious scourge'.⁸¹

In its advisory opinion on the *Reservations to the Genocide Convention* case⁸², the ICJ emphasized that the crime of genocide “shocks the conscience of mankind, results in great losses to humanity ... and is contrary to moral law and the spirit and aims of the United Nations.” In the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))*⁸³, the ICJ further emphasized that the rights and obligations contained in the *Genocide Convention* are rights and obligations *erga omnes*. Accordingly, the crime is susceptible to universal jurisdiction. Thus, it is argued that the state immunity rule should not be a bar to prosecution in foreign courts of culpable high-ranking state officials.⁸⁴

Irrespective of the gravity of this crime in international law and the strength of the peremptory norm against its commission, there have been many instances of perpetration of the crime by high-ranking state officials since the later part of the twentieth century.⁸⁵ These include

⁸¹ *Democratic Republic of the Congo v Rwanda*, supra, note 80 at 31, para 64.

⁸² (1951) ICJ Reps 15 at 23.

⁸³ (1996) ICJ Reps, para. 31.

⁸⁴ Amnesty International, “*Ending Impunity in the United Kingdom for Genocide, Crimes Against Humanity, War Crimes, Torture and Other Crimes under International Law: The Urgent Need to Strengthen Universal Jurisdiction Legislation and to Enforce It Vigorously*”, July 2008 at 8, online: <http://www.redress.org/downloads/publications/UJ_Paper_15%20Oct%2008%20_4_.pdf>.

⁸⁵ See, eg., Scaruffi, Piero, “*The Worst Genocides of the Twentieth and Twenty-first Centuries*”, online: <<http://www.scaruffi.com/politics/dictat.html>>; United to End Genocide, “*Past Genocides and Mass Atrocities*”, online: <<http://endgenocide.org/learn/past-genocides/>>; Levene, Mark, “*Why is the Twentieth Century the Century of Genocide*” (2000) 11:2 JWH 305; Woolf, Linda M & Michael R Hulsizer, “*Psychological Roots of Genocide: Risk, Prevention, and Intervention*” (2005) 7:1 JGR 101; Rieder, Heide & Thomas Elbert, “*Rwanda - Lasting Imprints of a Genocide: Trauma, Mental Health and Psychological Conditions in Survivors, Former Prisoners and Their Children*” (2013) 7:6 Conflict and Health 1; Schabas, William, *Genocide in International Law: The Crimes of Crimes*, 2nd ed (Cambridge: Cambridge University Press, 2009) at 1-17.

the genocide in Yugoslavia⁸⁶ and those that occurred in Rwanda and Burundi⁸⁷. Other examples are the genocides in Darfur, Sudan⁸⁸, and in Tibet in northern China⁸⁹.

To worsen this situation, criminal proceedings against culpable high-ranking state officials before the judicial tribunals of other states are stifled by the state immunity rule. For example, on January 11, 2006, it was reported that the Spanish High Court would investigate whether seven former Chinese state officials, including the former President, Jiang Zemin, and former Premier, Li Peng, participated in genocide in Tibet. This proposed investigation followed the Spanish Constitutional Court's ruling that Spanish courts have universal jurisdiction to try genocide cases. The proceedings in this investigation were opened by the Spanish Judge on June 6, 2006. On the same day, China denounced the Spanish court's investigation into the claims of genocide in Tibet as an interference in China's internal affairs. Eventually, the case was dismissed on grounds of state immunity.⁹⁰ In *Re Sharon & Yaron*⁹¹, charges of genocide leveled against Ariel Sharon (then Israeli Prime Minister) before the Belgian court was dismissed on grounds of state immunity. In the *Re Kagame*⁹², the Spanish Audiencia Nacional also dismissed, on grounds of state immunity, criminal charges commenced against Paul Kagame (the incumbent Rwandan Prime Minister) for genocide and allied international crimes.

It is not out of place to state that in the event of total absence of immunity *ratione personae* for some sitting state officials, some overzealous domestic courts would misuse and

⁸⁶ See King, FP and AL Rosa, "The Jurisprudence of the Yugoslavia Tribunal: 1994-1996" (1997) 1 EJIL 123.

⁸⁷ Lindholt, L, "Human Rights in Rwanda and Burundi: A Comparative Analysis" (1999) 11 ASICL Proc. 95.

⁸⁸ *Report of the International Commission on Darfur to the United Nations Secretary-General* (2005) 5:3 The Constitution 49-139.

⁸⁹ Jones, Adam, *Genocide : A Comprehensive Introduction* (New York: Routledge, 2006) at 94-98; NGO Group for the Convention on the Rights of the Child, "Genocide in Tibet – Children of Despair – Introduction by Paul Ingram", Database of NGO Reports presented to the UN Committee on the Rights of the Child, online: <<http://resourcecentre.savethechildren.se/sites/default/files/documents/2086.pdf>>.

⁹⁰ Olesen, A, "China Rejects Spain's Genocide Claim", The UK Independent, online: <<http://www.news.independent.co.uk/world/asia/article656410.ece>>.

⁹¹ Supra, note 28.

⁹² Supra, note 31.

abuse this jurisdiction to try and “rule the world”.⁹³ However, it is obvious that the absolute and indiscriminate bar it constitutes would, most likely, continue to set free high-ranking state officials charged for this crime, even when there is clear and irresistible evidence of their culpability. Inferences of this likelihood could be drawn from the ratios of relevant judicial decisions regarding the general effect of state immunity on international criminal proceedings before foreign national courts. In the *ICJ Arrest Warrant Case*⁹⁴, for example, Belgium argued, inter alia, that while foreign ministers in office enjoy immunity from foreign criminal jurisdiction, such immunity applies to acts carried out in their official capacity and cannot protect them in respect of private acts (including international crimes).⁹⁵ Belgium also argued that the DRC foreign minister was not acting in an official capacity at the time he committed the alleged international crimes. However, the ICJ held thus:

... the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another state In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private" capacity, or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office.... *The Court has ... been unable to deduce ... that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs*⁹⁶

It is arguable that, although this may be the current legal position, this judicial trend could encourage high-ranking state officials to continue committing genocide with endless

⁹³ See, e.g., Lemaitre, Roemer, “*Belgium Rules the World*: Universal Jurisdiction over Human Rights Atrocities*”, online: <<https://www.law.kuleuven.be/jura/art/37n2/lemaitre.htm>>; Jouet, Mugambi, “*Spain’s Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China and Beyond*” (2007) 35 GA. J. INT’L & COMP. L. 495.

⁹⁴ Supra, note 9.

⁹⁵ Ibid at 20, paras 49-50.

⁹⁶ Ibid at 22, paras 54-58. Emphasis supplied.

impunity. These officials know that it is almost impossible to prosecute them in the national courts of their home states for this crime. Consequently, according them indiscriminate immunity before foreign courts vested with universal jurisdiction amounts to giving them a sense of perpetual freedom from accountability for this crime. Obviously, this does not only perpetuate danger to prospective victims of this crime; it also undermines the ends of justice which international legal regulation must uphold. This is so, although there is some possibility of abuse of this jurisdiction by some national courts.⁹⁷

3.2.1.3 War Crimes and Crimes against Humanity

From early times, war crimes have been viewed as very serious, and have, as such, been strictly prohibited in international law, including under various treaties.⁹⁸ These treaties include the *Charter of the International Military Tribunal, Nuremberg* (the “*Nuremberg Charter*”)⁹⁹, the four *Geneva “Red Cross” Conventions*¹⁰⁰ and their *Additional Protocols*¹⁰¹, and the *Rome Statute*¹⁰².

⁹⁷ See, e.g., UN General Assembly, “*Delegations Urge Clear Rules to Avoid Abuse of Universal Jurisdiction Principle, Seek Further Guidance from International Law Commission*”, Resolution of the 12th Meeting of the Sixth Committee of the Sixty-seventh General Assembly, UN Doc GA/L/3441 (17 October 2012).

⁹⁸ In summary, the treaties prohibit as war crimes the following acts committed during an international or non-international armed conflict situation by belligerents and combatants: (a) intentionally attacking civilian objects, and (b) intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or widespread and severe damage to the natural environment. Others are: (c) attacking or bombarding, by whatever means, towns, villages, etc, (d) indirect transfer of the civilian population of an occupied territory, (e) sexual violence, (f) recruitment of child soldiers, and (g) attacks against UN peacekeepers.

⁹⁹ 1945, 82 UNTS 279.

¹⁰⁰ i.e., *Geneva Convention I*, note 4; *Geneva Convention II*, supra, note 4; *Geneva Convention III*, supra, note 4; and, *Geneva Convention IV*, supra, note 4.

¹⁰¹ *Protocol I to the Geneva Conventions*, supra, note 4; and, *Protocol II to the Geneva Conventions*, supra, note 4.

¹⁰² Supra, note 78, art 8.

Crimes against humanity have been prohibited by the *Nuremberg Charter*¹⁰³ and the *Rome Statute*¹⁰⁴. These crimes are defined under these treaties.¹⁰⁵ The treaties also provide for individual criminal responsibility and removal of immunity in the prosecution of those guilty of this crime, irrespective of their official status.¹⁰⁶

Article 6 of the *Nuremberg Charter*¹⁰⁷, which deals with the prohibition of ‘war crimes’, ‘crimes against peace’ and ‘crimes against humanity’, has been confirmed by the UN General Assembly as representing customary international law.¹⁰⁸ One of the effects of this confirmation is that the courts of all states possess unlimited universal jurisdiction to try perpetrators of these crimes, despite their nationalities, official statuses and the places of violation. Thus, state immunity should not avail them in such trials, even if their home states are/were not parties to the prohibiting treaties. This is because by *article 38 of the Vienna Convention on the Law of Treaties*¹⁰⁹, “Nothing ... precludes a rule set out in a treaty from becoming binding upon a third

¹⁰³ Supra, note 99, art 6(c); See also Theodorakis, Nikos & David P Farrington, “*Emerging Challenges for Criminology: Drawing the Margins of Crimes Against Humanity*” (2013) 6:2 IJCS 1150; Ntoubandi, Faustin Z, *Amnesty for Crimes Against Humanity under International Law* (Leiden: Koninklijke Brill NV, 2007) at 50.

¹⁰⁴ Supra, note 78, art 7; See also Badar, Mohamed Elewa, “*From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*”, online: <<http://bura.brunel.ac.uk/bitstream/2438/1196/4/From%2Bthe%2BNuremberg%2BCharter%2Bto%2Bthe%2BRome%2BStatute%2BDefining%2Bthe%2BElements%2Bof%2BCrimes%2BAgainst%2BHumanity.pdf.txt>>.

¹⁰⁵ The treaties define these crimes to include any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population: (a) murder; (b) extermination; and, (c) enslavement. Others are: (d) deportation or forcible transfer of population; (e) persecution on internationally impermissible grounds; (f) sexual violence; (g) torture; (h) enforced disappearance; (i) apartheid, etc. See *Nuremberg Charter*, supra, art 6(c); *Rome Statute*, supra, note 83, art 7. See also Jalloh, Charles Chernor, “*What Makes a Crime Against Humanity a Crime Against Humanity*” (2013) 28:2 Am U Int’l L Rev 381; Kress, Claus, “*On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision*” (2010) 23 Leiden JIL 855; Luban, David, “*A Theory of Crimes Against Humanity*” (2004) 29 Yale J Int’l L 85; Shaack, BV, “*The Definition of Crimes Against Humanity: Resolving the Incoherence*” (1999) 37 CJTL 787.

¹⁰⁶ See, e.g., the *Nuremberg Charter*, supra, note 99, principle 3 and art 7; the *Rome Statute*, supra, note 78, art 27.

¹⁰⁷ Supra, note 99.

¹⁰⁸ *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, GA Resn 95(1), (1946) of 11 December 1946, UN GAOR 5th Sess Supp 12.

¹⁰⁹ Supra, note 1.

state as a rule of customary international law recognized as such.” Writing on ‘crimes against humanity’, Neil Boister and Richard Churchill¹¹⁰ comment that:

Customary international law provides that crimes against humanity give rise to the application of universal jurisdiction, avoiding the many problems associated with limited jurisdiction over treaty crimes and the application of treaties to the nationals of non-states parties ... *Furthermore, a crime against humanity is uncontroversially international and sovereign immunity does not apply.*¹¹¹

Despite this established position of international law on the two crimes, high-ranking state officials are still granted immunity from prosecution for them before the courts of other member states of the international community. In *Belhas v Ya’alon*¹¹², the US Court of Appeal affirmed dismissal of criminal charges for, inter alia, war crimes and crimes against humanity leveled against General Moshe Ya’alon, the retired Head of Intelligence of the Israeli Defence Forces (IDF). The charges stemmed from Ya’alon’s alleged involvement in the IDF’s April 1996 shelling of a UN peacekeepers’ compound in Qana in South Lebanon. Several hundred Lebanese civilians were seeking shelter in the compound. The shelling killed over a hundred civilians and injured many others, including four Fijian peacekeepers. The complainants alleged that Israeli helicopters observed civilians in the UN compound; that their reports put General Ya’alon on actual notice of the civilians’ presence; and that he failed to act to prevent the shelling. They contended that this failure violated principles of international law and, inter alia, constituted war crimes, extra-judicial killing and crimes against humanity, in that General Ya’alon bore command responsibility for the shelling. However, the District Court dismissed these charges on

¹¹⁰ Boister, Neil & Richard Burchill, op cit, note 75 at 631. See also Memari, Roza, “*The Duty to Prosecute Crimes Against Humanity under Universal Jurisdiction, Customary International Law, and Conventional International Law*” (2012) 31 IPEDR 130; Akhavan, Payam, “*The Universal Repression of Crimes Against Humanity Before National Jurisdictions: The Need for a Treaty-Based Obligation to Prosecute*”, in Sadat, Leila Nadya, *Forging a Convention for Crimes against Humanity* (Cambridge: Cambridge University Press, 2011) at 28.

¹¹¹ Emphasis supplied. See also Amnesty International, “*Ending Impunity in the United Kingdom for Genocide, Crimes Against Humanity, War Crimes, Torture and Other Crimes under International Law: The Urgent Need to Strengthen Universal Jurisdiction Legislation and to Enforce It Vigorously*”, op cit, note 84 at 6.

¹¹² 515 F. 3d 1279 (D.C. Cir. Feb. 15, 2008).

grounds of state immunity of General Ya'lon. In upholding this dismissal, the Court of Appeal held thus:

... It is not necessary for this court to reach the issue of whether the acts alleged by the appellants constitute violations of *jus cogens* norms because the *FISA* [*Foreign Sovereign Immunities Act*] contains no enumerated exceptions for violations of *jus cogens* norms. In *Princz v. Federal Republic of Germany*, we rejected this precise argument... This Court held that “it is doubtful that any state has ever violated *jus cogens* norms on a scale rivaling that of the Third Reich”, even violations of that magnitude do not create an exception to the *FISA* where Congress has created none... Although Appellants put a new twist on the argument that *jus cogens* violations can never be authorized by a foreign state and so can never cloak foreign officials in immunity – the same prohibition on creating new exceptions to the *FISA* holds....¹¹³

In the *ICJ Arrest Warrant Case*¹¹⁴, the ICJ further held that the criminal immunity from prosecution in foreign courts enjoyed by a foreign affairs minister under international law could not be set aside by a national court by charging him with war crimes or crimes against humanity.¹¹⁵

In the light of this line of judicial decisions, one may argue that men and women in many states of the world are not safe and secure in the hands of high-ranking state officials, no thanks to state immunity. Again, the essence of the entrenchment of peremptory norms in the international legal order and the prohibition of their violation may be undermined. The safety of the international community itself is also not guaranteed, and the eradication of impunity for the commission of these crimes by high-ranking state officials is far from near. In the end, it can

¹¹³ Ibid at 1283-1284. See also Centre for Justice and Accountability, “*Belhas v. Ya’alon: Opposing Sovereign Immunity for War Crimes and Extrajudicial Killing*”, online: <http://www.cja.org/article/article.php?id=325>; Ogilvy, Graham, “*Belhas v. Ya’alon: The Case for a Jus Cogens exception to the Foreign Immunities Act*” (2009) 8:1 JIBL 169; Weill, Sharon, *The Role of National Courts in applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 96; End the Occupation, “*US Campaign to End the Israeli Occupation: The Law Suit: Belhas, et. Al. v. Ya’Alon*”, online: <<http://endtheoccupation.org/article.php?id=1199>>.

¹¹⁴ Supra, note 9. See also Zan, Myint, “*Crimes Against Humanity: ‘Immunity’ versus ‘Impunity’: Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*” (2003) 7:1 JSPL 1, also online: <<http://www.usp.ac.fj/index.php?id=13251>>.

¹¹⁵ *ICJ Arrest Warrant Case*, supra, note 9 at 24, para 58.

only be said that the grant of state immunity in charges involving these crimes aggravates the impunity with which governments and high-ranking state officials violate the peremptory norms prohibiting their commission.

3.2.2 Violation of Other States' Territorial Integrity and Political Independence

Another peremptory norm that governs international relations is that of the sovereign equality of all states (big and small, mighty and weak). This is enshrined in the *UN Charter*¹¹⁶. Under *article 2(4)* of the *Charter*, one of the principal manifestations of this norm is that: “All members [states] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”¹¹⁷

According to Malcolm Shaw, “The rules governing resort to force form a central element within international law and, together with other principles such as territorial sovereignty and the independence and equality of states, provide the framework for international order.”¹¹⁸

Article 2(4) of the *UN Charter* is now regarded as a peremptory norm of customary international law and, as such, is binding upon all states.¹¹⁹ Consequently, the UN General Assembly has adopted many resolutions against states resorting to use of force against one another and, condemning any breach of this peremptory norm by any state. The Assembly's

¹¹⁶ Supra, note 4, art 2(1). See also Anand, RP, *Sovereign Equality of States in International Law* (Oxford: Pinnacle Technology, 2008) at 1; Ansong, Alex, “*The Operation of the Concept of Sovereign Equality of States in International Law*”, Selected Works of Alex Ansong, January 2012, online: <http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=alex_ansong>.

¹¹⁷ See also art 2(6) which extends the burden of respect for this norm to non-members of the UN.

¹¹⁸ Shaw, Malcolm N, *International Law*, 6th ed, op cit, note 16 at 1118.

¹¹⁹ Ibid at 1123.

1965 *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of their Independence and Sovereignty*¹²⁰ provides, inter alia, that:

No state has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements are condemned.

Furthermore, the Assembly, in its 1970 *Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*¹²¹, re-affirmed the “duty of states to refrain from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state.” In similar terms, the UN General Assembly’s *Definition of Aggression*¹²², annexed to the General Assembly’s *Resolution on the “Definition of Aggression”*¹²³, confirms acts of aggression as a violation of the *UN Charter*. The *Definition of Aggression* characterizes acts of aggression “the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state.” Judicially, the ICJ has long upheld the existence of this peremptory norm in its judgment in the *Corfu Channels* case (*Albania v UK*)¹²⁴ and in its advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons* case¹²⁵, respectively.

A violation of this norm amounts to committing the crime of aggression, which the Review Conference on the *Rome Statute of the International Criminal Court* recently defined

¹²⁰ UNGA Res 2131 (XX), of 21 December 1965.

¹²¹ UNGA Res 2625 (XXV), of 24 October 1970.

¹²² UNGA Res 3314 (XXIX), of 14 December 1974, arts 1-2.

¹²³ Ibid, art 3(g). See also Boas, Anouk T, “*The Definition of the Crime of Aggression and Its Relevance for Contemporary Armed Conflict*” ICD Brief 1, June 2013, at 1-13; Barriga, Stefan & Claus Kreb (eds), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge: Cambridge University Press, 2012) at 557-558; Dinstein, Yoram, *War, Aggression and Self Defence* (Cambridge: Cambridge University Press, 2011) at 138.

¹²⁴ (1949) ICJ Reps 4 at 35. See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*, Merits, Judgment (“*Nicaragua*” case) (1986) ICJ Reps 14.

¹²⁵ (1996) ICJ Reps 47 at 48; (1996) 35 ILM 809-823.

along the lines of the UN General Assembly's *Definition of Aggression*¹²⁶. Notwithstanding this peremptory norm, high-ranking state officials still plead state immunity to bar real or impending charges for this crime or for other crimes arising from their acts of aggression. For example, in February 2005, the then Lebanese Prime Minister, Rafiq Al-Hariri, was allegedly assassinated by foreign elements from Syria, an act that arguably amounts to aggression. The UN Independent Investigation set up to investigate this incident found evidence of the Syrian President's involvement in the assassination.¹²⁷ However, the Syrian President, Bashar Al-Assad, denied the allegation. He suggested in an interview that he would not allow UN investigators to interrogate him on the assassination, since he was shielded by state immunity in respect of any judicial process arising from the said assassination.¹²⁸

In the light of the *jus cogens* nature of this crime, states should be favourably disposed to exercising universal jurisdiction over international crimes arising from circumstances of aggression, most especially now that there has been an actual definition of aggression under the *Rome Statute*.¹²⁹ This would go a long way to bring under check the impunity with which high-ranking state officials commit this internationally destructive crime.¹³⁰ As pointed out by Patrycja Grzebyk:

Theoretically, there is ... the option of bringing perpetrators of the crime of aggression to trial in a court of a third state. It could be assumed that the

¹²⁶ Supra, notes 122 and 123.

¹²⁷ Harris, William, "Bashar al-Assad's Lebanon Gamble" (2005) 12:3 MEQ 33 at 33-44; "Al-Hariri Accuses Syria's Assad Again of Assassinating His Father", The Middle East Monitor, Monday, 20 January 2014, online: <<https://www.middleeastmonitor.com/news/middle-east/9334-al-hariri-accuses-syrias-assad-again-of-assassinating-his-father>>; Etheredge, Laura S, *Middle East Region in Transition: Syria, Lebanon, and Jordan* (New York: Britannica Educational Publishing, 2011) at 81.

¹²⁸ See, e.g., Sawma, Gabriel, "Immunity of Heads of State under International Law", online: <<http://www.gabriel-sawma.blogspot.com>>.

¹²⁹ See *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, 2010, RC/Res.6, Annex I.

¹³⁰ See, e.g., Scharf, Michael P, "Universal Jurisdiction and the Crime of Aggression" (2012) 53:2 Harvard ILJ 357 at 359; Jurdi, Nidal Nabil, "The Domestic Prosecution of the Crime of Aggression After the International Criminal Court Review Conference: Possibilities and Alternatives" (2013) 14 Melbourne JIL 1 at 4; Zemach, Ariel, "Reconciling Universal Jurisdiction with Equality before the Law" (2011) 47:1 Texas ILJ 143 at 152-197.

crime of aggression belongs to a group of crimes that are generally condemned under international law, and the states are allowed to invoke the principle of universal jurisdiction towards the perpetrators of the crime. This type of jurisdiction is contingent on the nature of the crime: for the exercise of the jurisdiction, the place where the crime was committed, the citizenship of the victim and the connection to the state that exercises jurisdiction are irrelevant.¹³¹

One concern, however, that could arise from the unlimited exercise of this universal jurisdiction over this crime is that the third state could be the victim state. In this case, the situation may become very problematic. This is because the crime of aggression is essentially a crime against a state. Thus, allowing the court of the victim state to try the perpetrators may raise the question of the state trying to be a judge over its own cause – *nemo iudex in causa sua*.

According to Grzebyk¹³², the proponents of the universal jurisdiction approach usually cite the ICJ's judgment in the *Barcelona Traction* case¹³³, which states as follows:

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

However, recent national court decisions on this subject do not really offer any ideas on how to confront the impunity with which high-ranking state officials violate this peremptory norm. Some national courts are still in favour of granting immunity to state officials in circumstances which raise involvement in this crime. In *McElhinney v Williams*¹³⁴, for example, the Supreme Court of Ireland held that international law required that a foreign state be accorded immunity in respect of acts *jure imperii* carried out by members of its armed forces, even when in the territory of the forum state without the forum state's permission. In *Margellos & Ors v*

¹³¹ Grzebyk, Patrycja, *Criminal Responsibility for the Crime of Aggression* (New York: Routledge, 2013) at 219.

¹³² Ibid.

¹³³ Supra. note 3.

¹³⁴ [1995] 3 Irish Reports 382; (1997) 104 ILR 691.

*Federal Republic of Germany*¹³⁵, the Greek Special Supreme Court (Anotato Eidiko Dikastirio)

stated:

... it appears that a foreign state continues to enjoy sovereign immunity in respect of proceedings relating to a tort committed in the forum state in which its armed forces participated, without distinction as to whether the action at issue violated jus cogens or whether the armed forces were participating in an armed conflict. Article 31 of the Basle Convention [immunity in respect of acts of armed forces] is formulated in absolute terms without any exceptions. This rule is justified by the necessity to respect the sovereignty of foreign states. One of the main expressions of that sovereignty is found in actions of their armed forces and such respect is the foundation of the equality of states and the international legal order, which the principal rules of international law are intended to serve.¹³⁶

Decisions of international judicial tribunals have also followed this approach. In *McElhinney v Ireland*¹³⁷, for example, the Grand Chamber of the European Court of Human Rights later held that the Irish Supreme Court's decision in *McElhinney v Williams*¹³⁸ reflected a widely held view of international law.¹³⁹

Although these decisions are not directly concerned with the specific crime of aggression and violation of other states' territorial sovereignty as discussed under the present sub-heading, the decisions suggest that a state is entitled to immunity regarding these nefarious acts. As argued earlier, this judicial position potentially increases the impunity and false sense of security on the part of governments and high-ranking state officials who are intent on violating this norm. Since culpable officials are protected by the state immunity rule, future violators may not be deterred. Also, it is arguable that continued affirmation of state immunity in such circumstances seriously undermines, if not absolutely defeats, the whole essence of the principles of sovereignty/sovereign equality, territorial integrity, and non-interference in the internal affairs of

¹³⁵ (2007) 129 ILR 525.

¹³⁶ Ibid at 532, para 14.

¹³⁷ App No 31253/96, Judgment of 21 November 2001, ECHR Reps 2001-XI, 39; 123 ILR 73, para 38.

¹³⁸ Supra, note 134.

¹³⁹ See also the *ICJ Jurisdictional Immunities Case*, supra, note 9 at 131-132, para 72.

states, upon which the international community and the international legal order are founded.¹⁴⁰

This practice adversely affects international peace and security, since officials of a stronger state can, at any time, baselessly invade or destroy a weaker one and go free of legal responsibility.¹⁴¹

As explained earlier, the US has been invading and carrying on wars on Iraq, Afghanistan and other states.¹⁴² In *Re Rumsfeld*¹⁴³, criminal charges against Donald Rumsfeld (a former US Defence Secretary) in the French courts for international crimes committed in the course of these invasions were dismissed by the Paris Prosecutors' Office on grounds of state immunity. Other incidents of aggression, such as the Israeli military invasion and massive destruction of Lebanon in 2006¹⁴⁴, the 2008 Russian invasion of Georgia¹⁴⁵, and Syria's recent bombing of some parts of neighbouring Turkey¹⁴⁶ in the course of the ongoing Syrian civil war, also need special attention.

Unlike other types of international crimes¹⁴⁷, there is no specific international legal instrument expressly authorizing national courts to assume universal jurisdiction over the crime of aggression.¹⁴⁸ One implication of this is that much of the norm prohibiting aggression has been left to the law of state responsibility. Individual culpability, e.g., for aggressive war as at

¹⁴⁰ Dunoff, Geoffrey L, "Is Sovereign equality Obsolete: Understanding Twenty-first Century International Organisations" (2012) 43 NYIL 99; Roth, Brad A, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* (Oxford: Oxford University Press, 2011) at 138.

¹⁴¹ See Firooz-Abadi, Dehghani, "The Islamic Republic of Iran and the Ideal International System", in Ehteshami, Anoushiravan & Reza Molavi (eds), *Iran and the International System* (New York: Routledge, 2012) 43 at 47; Krisch, Nico, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order" (2005) 16:3 EJIL 369 at 370; Simpson, Gerry, *Greta Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (New York: Cambridge University Press, 2004).

¹⁴² Ja'e, Yakubu Haruna, "United States war on Terror in the Middle East and Afghanistan: A Critical Assessment" (2014) 18 International Affairs and Global Strategy 32; Ragavan, Srividhya & Michael S Mireles, Jr, "The Status of Detainees from the Iraq and Afghanistan Conflicts" (2005) 2 Utah L Rev 619.

¹⁴³ Supra, note 47.

¹⁴⁴ See the UN Security Council Resolution 1701 of August 11, 2006, by which the Security Council determined that the then situation in Lebanon constituted a threat to international peace and security.

¹⁴⁵ Dyson, Stephen Benedict, "What Russia's Invasion of Georgia Means for Crimea", The Washington Post, 5 March 2014, online: <<http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/03/05/what-russias-invasion-of-georgia-means-for-crimea/>>.

¹⁴⁶ "NATO Demands Halt to Syria Aggression Against Turkey", The Turkish Daily News, October 4, 2012, online: <<http://www.hurriyetdailynews.com/nato-demands-halt-to-syria-aggression-against-turkey.aspx?pageID=238&nID=31634&NewsCatID=359>>.

¹⁴⁷ E.g., genocide, torture, war crimes and crimes against humanity.

¹⁴⁸ See, e.g., Grzebyk, Patrycja, op cit, note 131.

Nuremberg, is very rare. This situation would have contributed to the seeming reluctance on the part of these courts to exercise universal jurisdiction over this crime. It must have also substantially given rise to these courts' ever-readiness to grant immunity to perpetrators of the crime. However, it could be argued that the *jus cogens* nature of this crime, its extreme gravity, and the fact that it has been condemned without exception by many instruments for many decades since World War II, should have been enough to persuade all states to enact laws conferring universal jurisdiction on their national courts to prosecute alleged offenders.

It is encouraging that five states (Azerbaijan, Belarus, Bulgaria, the Czech Republic, and Estonia) have already enacted such laws.¹⁴⁹ Eighteen other states have statutes giving their courts universal jurisdiction generically over "offences against international law" under international treaties and under customary international law.¹⁵⁰ Since aggression is universally accepted as a serious crime under international law, the courts of these eighteen states should exercise universal jurisdiction over it. Hopefully more states would follow these leaders to assert such jurisdiction over aggression as an international crime. However, there is no doubt that the high-level politics over this crime and many (especially the powerful) states' inclination to state responsibility rather than individual accountability for it may continue to promote immunity for state officials over the crime. Again, the likelihood of want of fair trial when the courts of the victim state are to try the culpable state officials may pose another challenge.

The next sub-section considers systematic violation of human rights as another problem emanating from the application of the state immunity rule in the international criminal justice system.

¹⁴⁹ Scharf, Michael P, "*Universal Jurisdiction and the Crime of Aggression*", op cit, note 130 at 359.

¹⁵⁰ Ibid.

3.3 Systematic Violation of Human Rights

In contemporary international law, human rights, especially those relating to physical integrity, e.g., right to life, freedom from torture, genocide, and forced disappearance, are universally protected. Though the exact degree of protection afforded other human rights may be the subject of controversy¹⁵¹, there is widespread agreement that rights to physical integrity merit special protection. Such rights are non-derogable, even in times of war or national emergency.¹⁵² The norms protecting these rights are widely considered peremptory norms and their violations are considered serious wrongs to humanity and to the international community.¹⁵³

State-initiated and condoned killings, torture and disappearances, for example, violate specific human rights defined and protected under universally or widely accepted international instruments. Such instruments include the *Universal Declaration of Human Rights* (the “UDHR”)¹⁵⁴, the *International Covenant on Civil and Political Rights*¹⁵⁵, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*¹⁵⁶, the *American Convention on Human Rights*¹⁵⁷ and, the *African Charter on Human and Peoples Rights*¹⁵⁸.

¹⁵¹ E.g., the controversy over the extent of protection of economic, social and cultural rights, or “third generation” rights, such as the right to development. See, e.g., Baruchello, Giorgio & Rachael Lorna Johnstone, “*Rights and Value: Construing the International Covenant on Economic, Social and Cultural Rights as Civil Commons*” (2011) 5:1 SSJ 91 at 93; Langford, Malcolm et al (eds), *Global Justice, state Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (New York: Cambridge University Press, 2013).

¹⁵² See, e.g., *International Covenant on Civil and Political Rights*, 1966, UNTS I-14668, art 4(1); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950, ETS 5; 213 UNTS 221, art 15; *American Convention on Human Rights*, 1969, 1144 UNTS 123, art 27; Wet, Erika De, “*Jus Cogens and Obligations Erga Omnes*”, in Shelton, Dinah (ed), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013) 541 at 545; Richards, L David, “*An Umbrella With Holes: Respect for Non-Derogable Human Rights During Declared States of Emergency, 1996-2004*” (2012) 13 Hum Rights Rev 443.

¹⁵³ Zenovic, Predrag, “*Human Rights Enforcement Via Peremptory Norms – A Challenge to State Sovereignty*”, (2012, RGS� Research Papers No 6, at 9-21, online: <http://www.rgsl.edu.lv/uploads/files/RP_6_Zenovic_final.pdf>.

¹⁵⁴ 1948, UNGA Res 217(III) of 10 December 1948, arts 3,5 and 9.

¹⁵⁵ 1966, 999 UNTS 171, arts 6, 7 and 9.

¹⁵⁶ 1950, ETS 5; 213 UNTS 221, arts 1, 3 and 5.

¹⁵⁷ 1969, 1144 UNTS 123, arts 4, 5 and 7.

¹⁵⁸ 1981, OAU Doc. CAB/LEG/67/3 rev. 5; (1982) 21 ILM 58.

Furthermore, specific treaties dealing with torture¹⁵⁹ and disappearances¹⁶⁰, as well as judicial decisions declaring torture¹⁶¹ and disappearances¹⁶² as violations of customary international law, all point to clear prohibitions of state killing, torture, or forcibly causing the disappearance of citizens and foreign nationals. The rights not to be subjected to torture, summary execution or disappearance emanate from customary international law and, therefore, give rise to obligations owed by each state to the international community as a whole.¹⁶³

Another significant problem of the application of the state immunity rule in the international criminal justice system is that the impunity it induces in high-ranking state officials also leads them to massive violations of these human rights. This is basically because international criminal law and international human rights law are intertwined. Thus, the commission of each of the core international crimes (genocide, war crimes, crimes against humanity, torture, and the crime of aggression) almost always implicates violations of the human rights of individuals and groups. Consequently, where high-ranking state officials commit these crimes, internationally protected human rights are invariably abused. This situation is made worse by the fact that the same state immunity rule that bars foreign criminal proceedings against state officials that perpetrate these crimes also shields them from civil actions in foreign courts for violation of these rights.¹⁶⁴ Examples of this abound.

¹⁵⁹ The *Torture Convention*, supra, note 4.

¹⁶⁰ *Inter-American Convention on Forced Disappearances of Persons*, 1994, OASTS No 68.

¹⁶¹ *Filartiga v Pena-Irala*, 630 F. 2d 876 (2nd Cir. 1982); *Sosar v. Alvarez –Machain*, 542 U.S. 692 (2004).

¹⁶² *Forti v Suarez Mason*, 694 F. Supp. 707, 710 (1988).

¹⁶³ Dixon, Martin et al, *Cases and Materials on International Law*, 5th ed (Oxford: Oxford University Press, 2011) at 203; Roth-Arriaza, Naomi, “Introduction”, in Roth-Arriaza, Naomi (ed.), *Impunity and Human Rights in International Law and Practice* (Oxford: Oxford University Press, 1995) 3 at 6; Bianchi, Andrea, “Human Rights and the Magic of Jus Cogens” (2008) 19:3 EJIL 491.

¹⁶⁴ See McGregor, Lorna, “State Immunity and Human Rights: Is There a Future after *Germany v. Italy*?” (2013) 11:1 JICJ 125 at 125-127; Forcese, Craig, “De-immunizing Torture: Reconciling Human Rights and State Immunity” (2007) 52 McGill LJ 127; O’Keefe, Roger, “State Immunity and Human Rights: Heads and walls, Hearts and Minds” (2011) 44 Vanderbilt JTL 999 at 1000-1001.

In *Al-Adsani v Government of Kuwait*¹⁶⁵, the appellant (a British and Kuwaiti dual national) brought an action in the UK High Court against Kuwait (respondent) for the enforcement of his right to freedom from torture and other cruel, inhuman or degrading treatment. The facts of this case were that in 1991, Al-Adsani travelled from the UK to Kuwait to help repel Saddam Hussein's invasion of Kuwait during the Gulf War. There in Kuwait, he was accused of releasing into general circulation sexual video tapes of *Sheikh Jaber Al-Sabah Al-Saud Al-Sabah*, a close relative of the Emir of Kuwait. After the war, the Sheikh, with the aid of Kuwaiti government troops, exacted his revenge by breaking into Al-Adsani's house, beating him up and transporting him to the Kuwaiti state prison, where his beatings continued for days. Al-Adsani was subsequently taken at gunpoint in a government car to the palace of the Sheikh, where his ordeal intensified. According to Al-Adsani, his head was repeatedly submerged in a swimming pool filled with corpses, and his body was badly burned when he was forced into a small room where the Sheikh set fire to gasoline-soaked mattresses.

Upon his return to the UK, Al-Adsani brought this suit, seeking damages for the physical and psychological injuries that had resulted from his alleged ordeal in Kuwait. The High Court dismissed the suit for lack of jurisdiction, holding that Kuwait was entitled to foreign state immunity. His appeal to the UK Court of Appeal was dismissed on same grounds of state immunity.¹⁶⁶ The Court of Appeal held that the UK's *State Immunity Act*¹⁶⁷, which provides immunity for states and their officials, do not include torture as an exception. For the Court, there is no room for implied exceptions to the general rule, even where the violation of a *jus cogens* norm (such as the prohibition of torture) is involved. The Court rejected the appellant's

¹⁶⁵ (1995) 103 ILR 420.

¹⁶⁶ *Al-Adsani v. Government of Kuwait* (1996) 107 ILR 536.

¹⁶⁷ (1978) 17 ILM 1123.

argument that the term ‘immunity’ means immunity from sovereign acts that were in accordance with international law and excludes torture for which immunity could not be claimed.¹⁶⁸

After the UK House of Lords refused Al-Adsani leave to appeal against the judgment of the Court of Appeal, he filed an application with the ECHR¹⁶⁹, arguing principally that the UK had failed to protect his right not to be tortured under the *European Convention on Human Rights*¹⁷⁰. Again, he lost on grounds of state immunity. In its judgment, the ECHR, though recognizing that the prohibition of torture possesses a ‘special character’ in international law, still rejected Al-Adsani’s view that violation of such a fundamental norm compels denial of state immunity in civil suits.¹⁷¹ In the words of the court:

While noting the growing recognition of the overriding importance of the prohibition of torture, it is not established that there is yet acceptance in international law of the proposition that states are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum state.¹⁷²

The (ECHR) further stated that it could not see from the relevant instruments “any firm basis for concluding that as a matter of international law, a state no longer enjoys immunity from civil suits in the courts of another state where acts of torture are alleged.”¹⁷³

In *Saudi Arabia v Nelson*¹⁷⁴, the respondent sued Saudi Arabia in a US court, alleging that he was wrongfully arrested, imprisoned and tortured by the Saudi police on the orders of the

¹⁶⁸ See Grover, Sonja C, *The European Court of Human Rights as a Pathway to Impunity for International Crimes* (Berlin: Springer-Verlag, 2010) at 6.

¹⁶⁹ App. No. 35763/97 (ECHR).

¹⁷⁰ Supra, note 156, art 6(1).

¹⁷¹ ECHR Judgment (Nov 21, 2001), para 61.

¹⁷² Ibid, para 66.

¹⁷³ Ibid, para 61. See also Bates, Ed, “*The Al-Adsani Case, State Immunity and the International Legal Prohibition on Torture*” (2003) 3:2 HRLR 193. Bartsch, Kerstin & Bjorn Elberling, “*Jus Cogens vs. State Immunity, Round Two; The Decision of the European Court of Human Rights in the Kalegeropoulou et al. v. Greece and Germany Decision*” (2003) 4:5 GLJ 477.

¹⁷⁴ (1993) 100 ILR 544. See also Brohmer, Jurgen, *State Immunity and the Violation of Human Rights* (The Hague, The Netherlands: Kluwer Law International, 1997) at 65; Re Edward D, “*Human Rights, International Law and Domestic Courts*” (1996) 70:1 St John’s L Rev 51 at 58-65.

Saudi government. His action was barred on account of the Saudi government's immunity. On appeal, the US Supreme Court, while upholding the Saudi government's immunity, held that although the alleged wrongful arrest, imprisonment and torture by the Saudi government would amount to abuse of its police powers, "a foreign state's exercise of the power of its police has long been understood ... as peculiarly sovereign".¹⁷⁵

Similarly, the Superior Court of Justice of Ontario, Canada, was of the view, in *Bouzari v Islamic Republic of Iran*¹⁷⁶, that "...regardless of the state's ultimate purpose, exercises of the police, law enforcement and other security powers are inherently exercises of government authority and sovereign". The Court concluded that a customary norm existed to the effect that there was an ongoing rule providing state immunity for acts of torture committed outside the forum state. It, therefore, dismissed the plaintiff's argument that the *Convention against Torture, 1984*, and the *International Covenant on Civil and Political Rights, 1966*, impose an obligation on states to create civil remedies with regard to acts of torture committed abroad, or that such an obligation existed as a rule of *jus cogens*.¹⁷⁷ There was a similar decision by the UK House of Lords in *Holland v Lampen-Wolfe*¹⁷⁸, when the Court declined jurisdiction on grounds of state immunity.¹⁷⁹

In *Princz v Federal Republic of Germany*¹⁸⁰, the US Court of Appeals for the DC Circuit dismissed, on grounds of state immunity, a case of flagrant violations of human rights against the Federal Republic of Germany. The Court held thus:

¹⁷⁵ *Saudi Arabia v Nelson*, supra, note 174 at 553.

¹⁷⁶ (2004) 124 ILR 427 at 435.

¹⁷⁷ Ibid, at 441 and 443.

¹⁷⁸ (2001) 1 WLR 1571 at 1588.

¹⁷⁹ See a similar decision in *Sosa v Alvarez-Machain*, 124 S. Ct. 2739 at 2766 (on the immunity of high-ranking officials of the former South African Apartheid regime before the US courts over gross human rights violations). See also *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, Case No (2006) UKHL 26 (HL. June 14, 2006); *Hwang Geum Joo v Japan*, 172 F. Supp. 2d 52 (DDC 2001).

¹⁸⁰ 26 F.3d 1166 (D.C. Cir. 1994).

We think that something more clearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of section 1605(a)(1) [of the US Foreign Sovereign Immunities Act, 1976] would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations.

The ICJ's decision in the *ICJ Jurisdictional Immunities Case*¹⁸¹ re-confirmed this entire line of cases.

It could be argued that the indiscriminate application of the state immunity rule in the international criminal justice system that impliedly results in impunity for the violation of these rights consequently leads to an indirect breach of one of the aims of the United Nations. This aim, as contained in the *UN Charter*¹⁸² to which most (if not all) sovereign states are parties, says that the peoples of the United Nations are determined:

... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women ... and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom...¹⁸³

The *UN Charter* also provides that one of the purposes of the United Nations is: "To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language, or religion."¹⁸⁴

¹⁸¹ Supra, note 9.

¹⁸² Supra, note 4.

¹⁸³ Ibid, preamble.

¹⁸⁴ Ibid, art 1(3).

Consequently, as long as high-ranking state officials continue to enjoy immunity for international crimes, these officials will continue to violate internationally protected rights of individuals and groups. This having been stated the next problem stemming from the application of the state immunity rule in the international criminal justice system is examined below. This is the problem of deliberate and indiscriminate violation of other states' municipal laws.

3.4 Deliberate and Indiscriminate Violation of Other States' Municipal Laws

One other consequence of the indiscriminate application of the state immunity rule in the international criminal justice system is that it engenders in high-ranking state officials a special sense of impunity and freedom to violate the municipal laws of other states. It gives rise to situations where the officials of one state would enter into the territory of another state and deliberately violate the national laws of the latter and hope to get away without any legal responsibility. Since there is immunity for foreign high-ranking state officials for international and national crimes before the forum state's courts, the natural tendency is that they would continue to hide under the cloak of immunity for their deliberate violations of the forum state's local laws.¹⁸⁵

In *US v Sampol*¹⁸⁶, for instance, Chilean government officials went into the US and, against the US penal law, ordered the assassination of Orlando Letelier, former Chilean ambassador to the US. During their prosecution in the US courts, Chile argued, in defence, that even if its officials' act violated US penal law, such an act should not be the subject of discussion in the US courts. According to Chile, the orders to commit this act had been given in Chile and

¹⁸⁵ See, e.g., Chemerinsky, Erwin, "Against sovereign Immunity" (2001) 53 Stanford L Rev 1201 at 1202.

¹⁸⁶ 636 F. 2d 621 (D.C. Cir. 1980).

the accused officials were, therefore, covered by Chile's state immunity. This argument was upheld by the US Court of Appeal.

The decision of the UK High Court in *Alamieyeseigha v The Crown Prosecution Service*¹⁸⁷ is also relevant in this context. In this case, a governor of Bayelsa State of Nigeria was arrested in London, UK, and charged before the UK court for money laundering, a serious crime under the UK's *Proceeds of Crime Act*¹⁸⁸. This followed the discovery by the London Metropolitan Police in the governor's house in London of a cash sum of £1,800,000 stolen from the Bayelsa State treasury. The only defence put up by the governor was a plea of state immunity. However, the UK court rejected this plea on the ground that he did not qualify as a head of a sovereign state under international law. The decision in this case clearly suggests that if the accused person were to qualify as a high-ranking state official, the state immunity rule would have shielded him from prosecution for money laundering and allied crimes. This would have been so, even though his alleged acts clearly violated the provisions of the UK law.

Consequent upon this problem of deliberate and indiscriminate violation of other states' laws, it is argued that in applying the state immunity rule, reasonable equilibrium should be maintained between two conflicting interests. These interests are those of respect for the sovereignty of the foreign state via grant of state immunity, on the one hand, and the preservation of the sovereignty of the forum state via respect for its municipal laws, on the other hand. Otherwise, the concepts of equality of states in international law and respect for the territorial integrity and political independence of other states would become meaningless. This is because the practical advantage of these concepts in this circumstance becomes unilateral, tilting only in favour of the foreign state and always against the forum state. Thus, high-ranking officials of one

¹⁸⁷ (2007) 18 NWLR (Pt 1066) 423.

¹⁸⁸ UKL 2002, c 29, s 32(1).

sovereign state who have genuine cause to be within the territory of another sovereign state should not by any means see state immunity as a license for deliberate violation of the municipal laws of their host state. While commenting on similar abuse of diplomatic immunities by some of its beneficiaries in circumstances that would apply *mutatis mutandis* to state immunity, Richard Gardiner pertinently affirms that:

The idea behind ... immunities is not that these foreigners ..., who are present as 'guests' within a host state, should be allowed to violate the local law with impunity, but that they need to be protected from interference by the police, judicial or other state action if their role is not to be impeded, particularly at crucial moments. In exchange for this exemption from local coercive action, international law imposes requirements on such protected individuals to respect local laws...¹⁸⁹

This position should apply *mutatis mutandis* to all high-ranking state officials that benefit from the state immunity rule. Although the host state may expel the culpable foreign state official, it is argued that this, on most occasions, is not a sufficient alternative to justice, especially when the wrongful act is a serious crime of which individuals are victims. At this juncture, the thesis examines the next problem caused by state immunity in the international criminal justice system: perpetuation of injustice.

3.5 Perpetuation of Injustice

It is trite that one of the primary functions of law is the administration of justice for all and sundry without discrimination.¹⁹⁰ In the area of criminal law, one of the basic rationales for the criminal justice system, international or national, is to give redress and justice to victims of

¹⁸⁹ Gardiner, Richard K, *International Law* (Harlow, Essex, England: Pearson Education Ltd, 2003) at 340.

¹⁹⁰ Uygur, Gulriz, "The Rule of Law: Is the Line Between the Formal and the Moral Blurred?", in Flores, Imer B & Kenneth E Himma (eds), *Law, Liberty and the Rule of Law* (Dordrecht, Germany: Springer, 2013) 103 at 108.

crimes by sanctioning the offenders.¹⁹¹ In its judgment in *Prosecutor v Obrenovic*¹⁹², the Trial Chamber of the ICTY stated that:

Punishment must ... reflect both the calls for justice from the persons who have been victims or suffered because of the crimes, as well as respond to the call from the international community to end impunity for human rights violations and crimes Individual accountability for the crimes committed and commensurate punishment is the aim of criminal proceedings involving such grave crimes.

For the International Federation of Human Rights (IFHR)¹⁹³:

A key issue in any discussion about how to end impunity for human rights crimes is the victim's right to, and need for, justice. It is, in fact, unusual, if not exceptionally rare, for victims of human rights crimes to obtain justice. Many victims find it extremely difficult even to obtain any official acknowledgment of what was done to them. For survivors of torture and organised violence, obtaining some form of acknowledgement ... is particularly important therapeutically. Acknowledgement generally aids the healing process and can be key to the experience of a sense of closure. *By way of example, the response of Chilean victims to the arrest of General Pinochet in London demonstrates the importance of justice for victims. Even though, in that particular case, justice continues to be denied, many Chilean torture survivors nevertheless derived great comfort and hope that so seemingly invulnerable a criminal was brought within the reach of the law. The extraterritorial proceedings against Pinochet drew important public attention to the crimes he is alleged to have committed and ... on the obligation to ... provide reparations to victims.*¹⁹⁴

In line with this position, the international criminal justice system, in relevant treaties mentioned above and under international custom, prohibits international crimes and urges states

¹⁹¹ See McCarthy, Conor, "Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice" (2012) 10:2 JICJ 351 at 352; McCarthy, Conor, *Reparations and Victim Support in the International Criminal Court* (Cambridge: Cambridge University Press, 2012) at 47-48.

¹⁹² Case No IT-02-60/2-S 9 Judgment of 10 December 2003) at 13-14, paras 45-46. See also Roht-Arriaza, Naomi, "Punishment, Redress and Pardon: Theoretical and Psychological Approaches", in Roht-Arriaza, Naomi (ed), *Impunity and Human Rights in International Law and Practice* (Oxford: Oxford University Press, 1995) 13 at 17-18; Spiga, Valentina, "No Redress Without Justice" (2012) 10:5 JICJ 1377.

¹⁹³ International Federation of Human Rights, "Legal Remedies for Victims of 'International Crimes': Fostering an EU Approach to Extraterritorial Jurisdiction, Final Report", The Redress, March 2004 at 2; also online: <<http://www.redress.org/downloads/publications/LegalRemediesFinal.pdf>>.

¹⁹⁴ Emphasis supplied.

to exercise jurisdiction to try and punish the perpetrators. An objective of this is surely to give redress and justice to the victims of such crimes.

However, today, application of the state immunity rule in the international criminal justice system often renders this laudable objective meaningless in relation to the victims of these crimes when they are committed by foreign high-ranking state officials. In international criminal proceedings before foreign national courts in which state immunity is applied as a jurisdictional bar, it is obvious that victims are denied justice. Consequently, while victims are subjected to perpetual injustice in an international legal regime of avowed criminal justice, their malefactors enjoy freedom from legal accountability. The above-cited cases of *Re Mugabe*¹⁹⁵, *Re Mofaz*¹⁹⁶, *Re Sharon and Yaron*¹⁹⁷, and *Re Rumsfeld*¹⁹⁸, as well as the *ICJ Arrest Warrant Case*¹⁹⁹, are typical examples of this reality. Again, the fact that the state immunity rule also bars victims' actions for civil remedies against the officials and their states makes the victims' situation more pitiable. The plight of these victims is substantially captured in the words of the International Federation of Human Rights as follows:

Immunity is an expression of the principle of sovereign equality of States. Sovereign equality, however, can come into conflict with other principles of international law and fundamental norms of human dignity, such as States' obligations to repress "international crimes." Immunity has arisen as a potential obstacle in numerous cases based on extraterritorial jurisdiction. ... certain ... courts have ruled that immunity may prevail even in the context of criminal liability....²⁰⁰

The need for redress and justice for victims of international crimes committed by high-ranking state officials drives the argument that the continued applicability of the state immunity

¹⁹⁵ Supra, note 24.

¹⁹⁶ Supra, note 25.

¹⁹⁷ Supra, note 28.

¹⁹⁸ Supra, note 47.

¹⁹⁹ Supra, note 9.

²⁰⁰ International Federation of Human Rights, op cit, note 193 at 7-8. See also Henham, Ralph, "Some Reflections on the Role of Victims in the International Criminal Trial Process" (2004) 11:2-3 IRV 201.

rule in international criminal proceedings before national courts requires re-consideration. This concern is also carried forward when the observation of the state immunity rule creates the problem of unfair social dichotomy and inequality. This latter problem is discussed next.

3.6 Creation of Unfair Social Dichotomy and Inequality

In the contemporary world, the “rule of law” is one of the few social concepts that enjoy near universal acceptance.²⁰¹ In fact, no government stands out against it and none would hate to be associated with it.²⁰² The rule of law concept, in its most basic form, means that no one is above the law.²⁰³ One of the fundamental facets of this concept that runs through both international and municipal legal systems is the principle of ‘equality before the law’²⁰⁴. By this principle, all men and women are equal before the law and have equal rights and obligations under the law, notwithstanding differences in socio-political status. Thus, no one is above the law.²⁰⁵ Given its near universal popularity, it could be argued that the concept of the rule of law, together with the principle of equality before the law, belongs to the genre of “the general principles of law recognized by civilized nations” as one of the sources of international law applied by the ICJ under the *ICJ Statute*²⁰⁶.

The renowned jurists, AV Dicey and Ivor Jennings, have given pertinent clues to the implications of the principle of ‘equality before the law’. For Dicey, this principle means that:

... not only that ... no man is above the law, but ... that ... every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals ... every

²⁰¹ See, e.g., United Nations Rule of Law, “*What is the Rule of Law*”, online: < http://www.unrol.org/article.aspx?article_id=3>.

²⁰² Ewelukwa, DIO, “*The Rule of Law*” (1994-1997) NJR 1 at 1.

²⁰³ See Lexis Nexis “*The Rule of Law*”, online: < <http://www.lexisnexis.co.uk/en-uk/about-us/rule-of-law.page>>.

²⁰⁴ See e.g. first paragraph of the preamble to the *UN Charter*, supra, note 4. See also *Constitution of the Federal Republic of Nigeria*, supra, note 37, s 1(3).

²⁰⁵ See Ewelukwa, op cit, note 202 at 2.

²⁰⁶ Supra, note 36, art 38(1)(c).

official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.²⁰⁷

For Jennings²⁰⁸, equality before the law must be distinguished from economic and political equality, for it only:

assumes that amongst equals, the law should be equal and should be equally administered, that likes should be treated alike. The right to sue and be sued, to prosecute and be prosecuted, for the same kind of action should be the same for all persons of full age and understanding, and without distinction of ... social status or political influence.

As esteemed as the principle of equality before the law is, the state immunity rule substantially undermines it in the international criminal justice system. Consequently, there is practically no equality between ordinary individuals, on the one hand, and high-ranking state officials, on the other, as regards legal accountability for international crimes.

The state immunity rule's application in the system brings about a special form of social discrimination, inequality, and dichotomy among individuals. It creates two different classes of persons in the society. On the one hand, it makes high-ranking state officials untouchable "sacred cows" that can hardly ever be held legally accountable for their international crimes (no matter how atrocious and universally devastating the crimes may be). On the other hand, it makes ordinary individuals exemplary "scapegoats" that must bear full accountability, suffer full punishments and make the necessary reparations for their own international crimes before foreign judicial tribunals. A practical example of this situation is the policy of non-cooperation and resistance towards the ICC which the AU currently maintains.²⁰⁹ It should be noted that recently, the AU obligated its member states to ensure that none of them implements the

²⁰⁷ Dicey, AV, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1961) at 193.

²⁰⁸ Jennings, Ivor, *The Law and the Constitution* (London: University of London Press, 1959) at 56-57.

²⁰⁹ See, e.g., Ifeonu, Eberechi, *From Consent to Suspicion: Understanding the African Union's Emerging Resistance to the Enforcement of International Criminal Justice in the African Region* (Saarbrücken, Germany: ADM Verlag, 2009).

warrants of arrest issued by the ICC against some sitting African high-ranking state officials.²¹⁰ No doubt, the alleged grounds for this policy, which include the ICC's selective justice against African state officials and the suspicion that the ICC mechanism is a developed states' agent of neo-colonialism against Africa, have some merit.²¹¹ However, by this policy, the AU is trying to accord these officials immunity from international criminal prosecution.

All this practice obviously runs contrary to the wishes of the founders of the international criminal justice system, who had intended that all individuals be accountable for international crimes, notwithstanding differences in political and allied statuses. When the institutionalization of international criminal law began, it was debated whether holding a specific office should exempt an individual from trial for an international crime.²¹² Disgusted, however, at the nature of weapons used and the horrors of the First World War, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties maintained that there should be no such exemption. According to the Commission: "... in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states."²¹³

Consequently, there should be no protection under any circumstance if great outrages against the laws and customs of war and the laws of humanity had occurred, because inability to

²¹⁰ See *AU Assembly Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) – Doc.EX.CL/710(XX)*, Assembly/AU/Dec.397(XVIII), pg1-2, para 8.

²¹¹ These are addressed in Chapter Five.

²¹² Grzebyk, Patrycja, *Criminal Responsibility for the Crime of Aggression*, op cit, note 131 at 230-231.

²¹³ *Report to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* (1920) 14 AJIL 95 at 116.

investigate and try such outrages “would shock the conscience of civilized mankind”.²¹⁴ For the Commission²¹⁵:

... the vindication of the principles of the laws and customs of war and the laws of humanity which have been violated would be incomplete *if he [head of state] were not brought to trial and if other offenders less highly placed were punished; moreover, the trial of the offenders might be seriously prejudiced if they attempted and were able to plead the superior orders of a sovereign against whom no steps had been or were being taken.*²¹⁶

The Commission concluded that “All persons belonging to enemy countries, however high their positions may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity are liable to prosecution.”²¹⁷

Clearly, the Commission’s position accords with the demands of justice. It should be followed in contemporary international criminal proceedings before national courts. This position affirms the inherent equality of all human beings.²¹⁸ There is no justification for holding some human beings accountable for international crimes while others are exempted on the basis of their political status.

²¹⁴ Grzebyk, Patrycja, op cit, note 131 at 230-231.

²¹⁵ *Report to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, op cit, note 213 at 117.

²¹⁶ Emphasis supplied. See also Vrdoljak, Ana Filipa, “*Genocide and Restitution: Ensuring Each Group’s Contribution to Humanity*” (2011) 22:1 EJIL 17 at 19-20; Sadat, Leila Nadya, “*Crimes Against Humanity in the Modern Age*” (2013) 107:2 AJIL 334 at 337.

²¹⁷ *Report to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, op cit, note 213 at 117. See also Shelton, Dinah, “*The Status of the Individual in International Law*” (2006) ASIL Proceedings 249 at 249-250; Neff, Stephen C, *Justice among Nations: A History of International Law* (Cambridge, Massachusetts, USA: Harvard College, 2014) at 345-350. Parlett Kate, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge: Cambridge University Press, 2011) at 235.

²¹⁸ See, e.g., MacKinnon, Barbara & Andrew Flala, *Ethics: Theory and Contemporary Issues*, 8th ed (Connecticut, USA: Cengage Learning, 2012) at 138; Kraynak, Robert P, “*Thomas Hobbes, From Classical Natural Law to Modern Natural Rights*”, online: <file:///C:/Documents%20and%20Settings/Owner/My%20Documents/Downloads/21.Pdf>

The next problem arising from the application of the state immunity rule in the international criminal justice system is that of political self-perpetuation. This is examined next.

3.7 Political Self-perpetuation

Some recent judicial decisions have begun to indicate that with regard to international crimes, a high-ranking state official benefiting from immunity *ratione personae* stands to lose that immunity once he leaves office. For instance, in the landmark decision in the *Pinochet* case²¹⁹, the UK House of Lords, while upholding the immunity of a serving head of state, held that the moment the head of state leaves office, he or she is liable to prosecution for international crimes committed before or after his or her term of office, or committed in a personal capacity while in office.

The decisions in *Re Gaddafi*²²⁰, *Re Castro*²²¹, *Re Mugabe*²²², and the *ICJ Arrest Warrant Case*²²³, also made reference to the immunity of “serving” heads of state and other high-ranking state officials. These decisions confirm the emerging trend to not extend immunity protection to former high-ranking state officials except for their purely official acts. In this regard, Malcolm Shaw states that “... the immunity of a former head of state differs [from that of a serving head of state] in that it may be seen as moving from a status immunity (*ratione personae*) to a functional immunity (*ratione materiae*), so that immunity will only exist for official acts done while in office ...”²²⁴

²¹⁹ Supra, note 42.

²²⁰ Supra, note 26.

²²¹ Supra, note 30.

²²² Supra, note 24.

²²³ Supra, note 9.

²²⁴ Shaw, Malcolm N, *International Law*, 6th ed, op cit, note 16 at 738.

The laudable innovation introduced by this line of decisions notwithstanding, the distinction drawn between serving and former officials could, on its own, create another social problem for the international criminal justice system. The balance of this distinction tilts in favour of serving officials. Consequently, the desire to enjoy international criminal immunity forever would induce serving officials to do everything possible to remain in power for life. Since stepping out of political power means losing immunity, while remaining in power in perpetuity implies immunity for life, these officials would prefer to devise every imaginable means to hang on to political power for their lifetime. An instance of this situation is provided by allegations of many atrocities that Robert Mugabe's government is committing to remain in power in Zimbabwe.²²⁵

It is, therefore, argued that the habit among some high-ranking officials in some states of not wanting to relinquish political power, even when they have become unpopular, may not be unconnected to the desire to enjoy state immunity for life. For example, as noted under Chapter One, Augusto Pinochet made himself a "*Senator-for-life*" with perpetual immunity from criminal prosecution or civil action for any of his misdeeds committed before, while in power, and after exit from power as Chilean President.²²⁶ Robert Mugabe remains, without the slightest thought of exit, the President of Zimbabwe, as he has been since that state's independence in 1980.²²⁷ These and other examples show that in some states, democratic governance is a mere

²²⁵ See, e.g., Zimbabwe Situation, "*UN Urged to Refer Mugabe to International Criminal Court*", August 14, 2013, online: < http://www.zimbabwesituation.com/news/jb_un-urged-to-refer-mugabe-to-international-criminal-court/>.

²²⁶ Slapper, Gary & David Kelly, *The English Legal System: 2014-2015*, 15th ed (Oxford: Routledge, 2014) at 454-460; Kornbluh, Peter, *The Pinochet File: A Declassified Dossier on Atrocity and Accountability* (New York: New press, 2013) at 20; Power, Robert C, "*Pinochet and the Uncertain Globalization of Criminal Law*" (2007) 39:1 GWILR 89 at 127-133.

²²⁷ Miller, RWR, "*Final Days – The Decay of Robert Mugabe's Personal Rule in Zimbabwe: Sifting Through the Rumours*", The SAGE International, 2012 at 1; also online: < file:///C:/Documents%20and%20Settings/Owner/My %20Documents/Downloads/Final+days.pdf>; Nzongola-Ntalaja, G, "*Democratic Transitions in Africa*" (2006) 1 The Constitution 1.

fiction, as these perpetual-immunity-hungry officials manipulate the political processes of their states to remain in power.

The foregoing problem is complemented by official corruption and bad governance, which are next discussed.

3.8 Conclusion

As has been argued here, application of the state immunity rule gives rise to many problems in the international criminal justice system. These problems, as discussed in this chapter include: impunity for flagrant violation of peremptory international legal norms, systematic violation of human rights, deliberate and indiscriminate violation of other states' municipal laws, and perpetuation of injustice. Others are: creation of unfair social dichotomy and inequality, and political self-perpetuation. These problems lead to a substantial erosion of the basic aims and objectives of the international criminal justice system and, therefore, call for an effective solution.

To this end, the international community has adopted some legal mechanisms to respond to these problems. These mechanisms are examined in the next chapter.

CHAPTER 4

MECHANISMS OF LEGAL RESPONSE TO THE PROBLEMS OF THE STATE IMMUNITY RULE IN THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

4.1 Introduction

It is trite that there are two elements of a crime: the “*mens rea*” (mental element) and the “*actus reus*” (physical element). As a general rule, these two elements must coincide for a particular act or omission of a person to constitute a crime.¹ Under international criminal law, it is established that these two elements of a crime can only be completed by individuals, not by states. Consequently, international criminal law, unlike general international law, emphasizes individual criminal responsibility, as opposed to state responsibility (although an international crime may sometimes necessarily implicate the responsibility of the state).² Thus, according to the Nuremberg Tribunal, “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”³

The fact remains that the most heinous international crimes are more likely to be committed by high-ranking state officials who would, most probably, hide behind state immunity to avoid personal accountability. Consequently, the international community has adopted certain mechanisms of response, which are intended to abolish or disregard such immunity in appropriate cases and to hold personally accountable individual state officials who commit these

¹ Martin, Jacqueline & Tony Storey, *Unlocking Criminal Law*, 4th ed (Oxford: Routledge, 2013) at 19; Ormerod, David, *Smith and Hogan’s Criminal Law*, 13th ed (Oxford: Oxford University Press, 2011) at 103; Clarkson, Christopher MV, *Understanding Criminal Law*, 4th ed (London: Sweet & Maxwell, 2005) at 15.

² Slidregt, Elies van, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012) at 5; Nystedt, Maria et al, *A Handbook on Assisting International Criminal Investigations* (Sandoverken, Sweden: Folke Bernadotte Academy, 2012) at 32; Nollkaemper, Andre, “*Systemic Effects of International Responsibility for International Crimes*” (2010) 8:1 Santa Clara JIL 313 at 313-314.

³ International Military Tribunal (Nuremberg), “*Judgment and Sentences, October 1 1946: Judgment*” (1947) 41 AJIL 172 at 221. See also Webb, Philippa, *International Judicial Integration and Fragmentation* (Oxford: Oxford University Press, 2013) at 20.

crimes. These mechanisms principally involve the creation of international/internationalized criminal tribunals to try individuals accused of such crimes and inserting state-immunity-stripping provisions in the enabling legal instruments of these tribunals. The operations and jurisprudence of these tribunals have established the legal position that, unlike in national courts, there is no immunity before international/internationalized criminal tribunals. Another mechanism involves the popularization of the universal criminal jurisdiction principle under both customary international law and some international treaties.

By virtue of these mechanisms, the duties and obligations imposed by international criminal law thus bind individuals directly, regardless of their political/official statuses or the provisions of their states' internal laws. These mechanisms have seen some success in holding high-ranking state officials legally responsible for their international crimes and in reducing the impunity with which the officials commit these crimes.

The response mechanisms are discussed in the following order: The Old *Ad hoc* International Criminal Tribunal, the Universal Criminal Jurisdiction, the Modern *Ad hoc* International Criminal Tribunal, the Hybrid Criminal Tribunal, and the Permanent International Criminal Court Mechanisms.

4.2 The Old *Ad hoc* International Criminal Tribunal Mechanism

At various times in history, urgent needs arose to contain adverse security situations in some regions or states and to forestall further breaches of international peace and security. In response, the international community, by means of relevant instruments, established or recommended the establishment of some ad hoc international criminal tribunals⁴ to try persons

⁴ See, e.g., Gordon, Gregory S, “*The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the future of Persecution Law*” (2014) Ohio State LJ 571 at 573-593; Sievert, Ron, “*A New Perspective on the International*

responsible for serious violations of international criminal law in those regions or states.⁵ The enabling legal instruments of these tribunals stipulate the international crimes over which the tribunals could exercise jurisdiction. Most relevantly, these instruments provide, in express terms, for the removal of the immunity of any head of state or other high-ranking state officials charged with crimes within the jurisdictions of the tribunals. The legal regimes under this response mechanism are as discussed below.

4.2.1 The Pre-Treaty-of-Versailles Legal Regime⁶

What looks like the first successful international attempt to remove the immunity of a high-ranking state official and hold him personally accountable for his international crimes was recorded in the year 1474. This was done when some then European city states (who formed the “*League of Constance*”) set up an *ad hoc* international criminal tribunal that tried *Sir Peter Von Hagenbach* in the city of Breisach for atrocities he committed while serving the Duke of Burgundy.⁷ Hagenbach was tried by the tribunal for crimes in violation of the “*laws of God and man*” which he committed during his reign as the governor of the Duke’s Alsatian territories

Criminal Court: Why the Right Should Embrace the ICC and How America Can Use It (2006) 68 University of Pittsburgh LR 77 at 87-93; Zyberi, Gentian, “*The Role of the International Courts and Tribunals in the Pursuit of Peace, Justice and the Responsibility to Protect*”, The International Law Observer, 13/12/2012, online: < <http://www.internationallawobserver.eu/2012/12/13/the-role-of-the-international-courts-and-tribunals-in-the-pursuit-of-peace-justice-and-the-responsibility-to-protect/>>.

⁵ See, e.g., Sriram, Chandra Lekha et al, “*Evaluating and Comparing Strategies of Peacebuilding and Transnational Justice*”, JAD-PbP Working Paper Series, No 1, May 2009 at 15-19, also online: < http://www4.lu.se/upload/LUPDF/Samhallsvetenskap/Just_and_Durable_Peace/Workingpaper1.pdf>; Turns, D, “*War Crimes Without War – The Applicability of International Humanitarian Law to Atrocities in Non- international Armed Conflicts*” (1995) 7 AJICL (Pt 4) 804 at 820.

⁶ This part of the thesis is partly draws from the author’s research paper titled “*The International Criminal Court System: An Impartial or a Selective Justice Regime?*”, a research paper submitted to the Schulich School of Law, Dalhousie University, Halifax, Nova Scotia, Canada, April, 2014 at 2.

⁷ Guerreiro, Alexandre, “*From Breisach to Rome: International Court’s Long Road*” (2013) 2:24 UERJ-RFD 24 at 26; Greppi, Eduardo, “*The Evolution of Individual Criminal Responsibility under International Law*” (1999) 81:835 IRRC 531 at 531.

from 1469 to 1474.⁸ Despite his high-ranking official position in the Duke's government, his trial took place. He was found guilty, sentenced to death, and executed.⁹

However, for a couple of centuries after the Hagenbach trial, the crusade to subject to justice high-ranking state officials who committed international crimes suffered some decreased tempo. This might have been caused by an increased consciousness on the part of states to jealously guard their domestic affairs and national integrity.¹⁰

The attempt to humanize the *jus ad bellum* (the law of wars) after the *Battle of Solferino*¹¹ in the second half of the nineteenth century gave birth to the International Committee of the Red Cross (ICRC)¹² and the *Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*.¹³ A further attempt to create an international criminal court to prosecute all persons violating this Convention, however, failed.¹⁴

⁸ Gordon, Gregory S, "The Trial of Peter Von Hagenbach: Reconciling History, Historiography and International Criminal Law", in Heller, Kevin Jon and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford: Oxford University Press, 2013) at 13. See also Solis, Gray D, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2010) at 28-30.

⁹ Gordon, Gregory S, "The Trial of Peter Von Hagenbach: Reconciling History, Historiography and International Criminal Law", op cit, note 8 at 27-37.

¹⁰ This situation must have been exacerbated by the adoption of the *Treaty of Westphalia*, 1648, online: http://www.avalon.yale.edu/17th_century/westphal.asp. This Treaty is also known as the "Peace of Westphalia" or the "Peace of Exhaustion". It, inter alia, enunciated the concepts of state sovereignty and non-intervention in domestic affairs, by virtue of which all matters within a state's internal affairs are no concern of another state and, therefore, not subject to external review. See, e.g., Croxton, Derek, "The Peace of Westphalia of 1648 and the Origins of Sovereignty" (1999) 21:3 Int'l Hist Rev 569; Hassan, Daud, "The Rise of the Territorial State and the Treaty of Westphalia" (2006) 9 YNZJ 62; Straumann, Benjamin, "The Peace of Westphalia as a Secular Constitution" (2008) 15:2 Constellations 173; Beaulac, Stephane, "The Westphalian Model in Defining International Law: Challenging the Myth" (2004) 7 AJLH 181; Boas, Gideon, *Public International Law: Contemporary Principles and Perspectives* (Massachusetts: Edward Elgar, 2012) at 8-9; Jackson, John H, "Sovereignty – Modern: A New Approach to an Outdated Concept" (2003) 97 AM J Int'l L 782 at 782; Hehir, J Bryan, "Intervention: From Theories to Cases" (1995) 9 E&IA 1 at 2-3; Gill, Bates & James Reilly, "Sovereignty, Intervention and Peacekeeping: The View From Beijing" (2000) 42:3 Survival 41 at 41-42.

¹¹ The battle, which was fought on 24 July 1859 between the allied forces of France and Sardinia against the Austrian army, left wounded and dying soldiers abandoned in the battlefield in pathetic conditions.

¹² Guerreiro, Alexandre, op cit, note 7 at 28. See also Bugnion, Francois, "Geneva and the Red Cross", in Dembinski-Goumard, Dominique, *International Geneva Yearbook 2005-2006: Organization and Activities of International Institutions in Geneva, Vol XIX* (Geneva: United Nations, 2005) 5 at 5-7.

¹³ 1864, online: <http://www.avalon.law.yale.edu/19th_century/geneva04.asp>.

¹⁴ See Guerreiro, op cit, note 7 at 28-29. See also Hall, Christopher Keith, "The First Proposal to Establish a Permanent International Criminal Court", online: <<http://www.icrc.org/eng/resources/documents/misc/57jp4m.html>>.

4.2.2 The *Treaty of Versailles* Regime

The international community's anti-state-immunity response in the international criminal justice system was rekindled in the first quarter of the twentieth century, i.e., after the First World War.¹⁵ Disgusted at the nature of weapons used, as well as the horrors of this war, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, recommended the trial and punishment of all individuals from the enemy countries that committed international crimes during the war. For the Commission, "...there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states."¹⁶ In conclusion, it stated that: "All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."¹⁷

The Paris Peace Conference that constituted the Commission on 25 January 1919¹⁸ also adopted the *Treaty of Versailles*¹⁹ (one of the peace treaties adopted at the end of the war

¹⁵ See Kirsch, Phillippe & Valerie Oosterveld, "Negotiating an Institution for the Twenty-first Century: Multilateral Diplomacy and the International Criminal Court" (2001) 46 McGill LJ 1141 at 1143.

¹⁶ *Report to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* (1920) 14 AJIL 95 at 116-117. See also Agbor, Avitus, A, *Instigation to Crimes Against Humanity: The Flawed Jurisprudence of the Trial and Appeal Chambers of the International Criminal Tribunal for Rwanda* (Leiden: Koninklijke Brill NV, 2013) at 89; Simpson, Gerry, "Atrocity, Law, Humanity: Punishing Human Rights Violators", in Gearty, Conor & Costas, Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge: Cambridge University Press, 2012) 114 at 116; Meron, Theodor, *The Making of International Criminal Justice: A View from the Bench: Selected Speeches* (Oxford: Oxford University Press, 2011) at 80; Parlett, Kate, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge: Cambridge University Press, 2011) at 235.

¹⁷ *Report to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, op cit, note 16 at 117.

¹⁸ See Firstworldwar.com, "Primary Documents – Report of Commission to Determine War Guilt", 6 May 1999, online: <<http://www.firstworldwar.com/source/commissionwarguilt.htm>>.

¹⁹ (1919) 13 AJIL 151 at 385; (1919) 225 Parry 188; (1919) 2 Bevans 235; also online: <<http://www.avalon.law.yale.edu/imt/partvii.asp>>.

between the Allied Powers²⁰ and the Central Powers²¹, especially Germany). *Article 227* of this treaty, inter alia, provided for the creation of a special international criminal tribunal to try then German Emperor, Kaiser Wilhelm II “for a supreme offence against international morality and the sanctity of treaties”.²² The Emperor was proposed to be tried, notwithstanding his official capacity as a sovereign head of state at all times relevant to the commission of his alleged crimes. Thus, his state immunity protection was disregarded in favour of his individual accountability for international crimes.²³

In addition, the treaty provided for the right of the Allied and associated Powers to bring before international military tribunals persons (from the enemy states) accused of having committed acts in violation of the laws and customs of war.²⁴ This tribunal could not eventually be set up, as the Netherlands granted asylum to the Emperor and refused to hand him over to the Allied Powers for trial until he died in 1941.²⁵ However, the anti-state immunity position of this legal regime must have laid some foundation in this regard for the legal regimes of subsequent ad hoc tribunals, especially the Nuremberg and Tokyo Tribunals, which are examined next.

While summarizing the contributions of this treaty to the development of the international criminal justice system, Alexandre Guerreiro is of the view that²⁶:

The Versailles Treaty also broke ground in International Law when it (i) combined the principle of self-determination of peoples to the concept of

²⁰ The Allied Powers were US, Britain, France, Italy and Japan.

²¹ The Central Powers included Germany, Austria, Turkey and Bulgaria.

²² *Treaty of Versailles*, supra, note 19, art 227. See also Hingsheng, Sheng, “*The Evolution of Law of War*” (2006) 1 CJP 267 at 287; Penrose, Mary Magaret, “*The Emperor’s Clothes: Evaluating Head of State Immunity under International Law*” (2010) 7:2 Santa Clara JIL 85 at 99-101.

²³ See, e.g., Moghalu, Kingsley Chiedu, *Global Justice: The Politics of War Crimes Trials* (Connecticut, USA: Praeger Publishing, 2008) at 18-26; Laughland, John, *A History of Political Trials: From Charles I to Saddam Hussein* (Oxford: Peter land Ltd, 2008) at 53-58.

²⁴ *Treaty of Versailles*, supra, note 19, art 228.

²⁵ See Morton, Jeffrey S, *The International Law Commission of the United Nations* (Columbia, South Carolina: University of South Carolina Press, 2000) at 56-57; MacDonogh, Giles, *The Last Kaiser: The Life of Wilhelm II* (New York: St Martin’s Griffin, 2003).

²⁶ Guerreiro, Alexandre, op cit, note 7 at 30-31.

world peace ...; (ii) *inspired the tendency to abandon the notion that the actions performed by the Head of State are acts of the State, leading to the individual possibly being charged by his actions no matter his position in government*²⁷; and (iii) reinforced the need to create international courts to address violations of International Humanitarian Law, since questions arose [as] to the ability and will of national courts to handle these matters. *The biggest contributions to International Humanitarian Law, by the Versailles Treaty, is that it demonstrated the possibility of breaching the primacy of state sovereignty, since it established the possibility of political interventions in the domestic affairs of a state with the goal of protecting human rights. It also reinforced the emergence of the individual as a subject of international law, not only an object left to be handled on lay as a matter of domestic law.*²⁸

The anti-state immunity position of this regime must have laid some foundation in this regard for the legal regimes of subsequent *ad hoc* tribunals, especially the Nuremberg and Tokyo Tribunals, which are examined next.

4.2.3 The Nuremberg Charter Regime

It was not until after the World War II that the first effective anti-state-immunity breakthrough occurred. After the war, the victorious Allied Powers²⁹ commenced negotiations on the establishment of an international tribunal for the trial and punishment of the German Nazis and their allies that committed international crimes during the war.³⁰ In order to accomplish this mission, part of the position advanced by these Allied Powers was that the state immunity rule should not act as a barrier to such trials and punishments. This is clearly stated in the report to the US President by Justice Jackson (the US representative to the International Conference on Military Trials) on June 6, 1945. According to Jackson:

²⁷ Emphasis supplied.

²⁸ Emphasis supplied.

²⁹ These Allied Powers included France, UK, US, USSR and China.

³⁰ See Sadat, Leila N, “*The International Criminal Court*” (May 1, 2014), Washington University in St Louis Legal Studies Research Paper No 14-05-02, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2437441>; Hale, Christopher Kip, “*Does the Evolution of International Criminal Law End With the ICC? The ‘Roaming ICC’: A Model International Criminal Court for a State-centric World of International Law*” (2008) 35:3/4 Denv J Int’l L & Pol’y 429 at 442-443.

... an inescapable responsibility rests upon this country to conduct an inquiry ... in association with others ... into the culpability of those whom there is probable cause to accuse of atrocities and other crimes.... To free them without a trial would mock the dead and make cynics of the living.... The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we deal with will permit.... Nor should such a defense be recognized as the obsolete doctrine that a head of state is immune from legal liability.... this idea is a relic of the doctrine of the divine right of kings.... We do not accept the paradox that legal responsibility should be the least where power is the greatest.... With the doctrine of immunity of a head of state ... nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility.... We will accuse a large number of individuals and officials who were in authority in the government, in the military establishment ...³¹

Accordingly, in 1945, the Allied Powers adopted the *London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement)*³². Annexed to the *London Agreement* was the *Charter of the International Military Tribunal (Nuremberg)*³³ (the “*IMT Charter*”, the “*Nuremberg Charter*”, or the “*Tribunal*”). The *IMT Charter* created the International Military Tribunal³⁴ at Nuremberg, Germany (the “*IMT*” or the “*Nuremberg Tribunal*”). The Nuremberg Tribunal was set up to try high-ranking Nazi German officials for the following crimes committed during the War II: war crimes, crimes against peace (now called crime of aggression), and crimes against humanity.³⁵ The *Charter* empowered the IMT to impose the death penalty or any other punishment it should deem just.³⁶

³¹ *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, to the United States President, June 6 1945* (Washington DC: Government Printing Office, 1949), art III, paras 1-3.

³² 1945, 82 UNTS 279.

³³ 1945, 82 UNTS 279.

³⁴ *Ibid*, art 1. The Allied Powers also promulgated the *Allied Control Council Law No 10*, 1945 (contained in Control Council for Germany Official Gazette, 31 January 1946 at 50) to try low-ranking Germans by lesser tribunals for the same World War II international crimes.

³⁵ *Nuremberg Charter*, *supra*, note 33, art 6.

³⁶ *Ibid*, arts 26-27.

One of the landmark innovations of the *Charter* was its abolition of the protection of state immunity in trials for the crimes under the *Charter*.³⁷ Under *article 7* of the *Nuremberg Charter*, “The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”³⁸

On the strength of this and other relevant provisions of the *Charter*, the Tribunal was able to try, convict, and sentence to various forms of punishment many high-ranking state officials of the Nazi regime in circumstances that would have readily attracted state immunity before national courts. For example, Karl Donitz (successor to Adolf Hitler and President of Germany after Hitler’s death) was sentenced to ten years’ imprisonment. Rudolf Hess (Hitler’s former deputy) was sentenced to life imprisonment, and Joachim Ribbentrop (Nazi Germany’s Minister of Foreign Affairs) was sentenced to death.³⁹ Thus, if Adolf Hitler (German leader of the Nazi regime) were to be alive upon the creation of this Tribunal, state immunity could not have protected him from trial before this Tribunal for the international crimes committed by the Nazi regime under his leadership.

The contribution of the Nuremberg Tribunal’s jurisprudence to the efforts at abolishing or disregarding state immunity in the international criminal justice system cannot be overemphasized. In fact, the Tribunal has the credit of making the first unambiguous judicial pronouncement on the non-applicability of the state immunity rule in international criminal

³⁷ Ibid, arts 7-8.

³⁸ This position is also repeated in *Principle III* of the *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* (1950) 2 YILC 374 at 375; also online: <http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf>.

³⁹ International Military Tribunal, Nuremberg, *Trial of the Major War Criminals Before the International Military Tribunal, 14 November 1945 – 1 October 1946, Vols I-XV* (Nuremberg, Germany: International Military Tribunal, 1947). See also Mettraux, Guenael (ed), *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press, 2008); International Military Tribunal (Nuremberg), “*Judgments and Sentences, October 1, 1946*” (1947) 41 AJIL 172 at 272-333; History Learning Site, “*Nuremberg War Crimes Trials*”, online: <http://www.historylearningsite.co.uk/nuremberg_war_crime_trials.htm>.

proceedings, a pronouncement that is cited as a *locus classicus* today. In the trials before the Tribunal, the accused persons argued that international law was concerned with the actions of sovereign states, and provides no punishment for individuals. They further argued that where the act in question is an act of the state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the state and, therefore, the state immunity rule.⁴⁰

In rejecting these arguments, the Tribunal held as follows⁴¹:

That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized.... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.... The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.... The very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. *He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.*⁴²

In sum, the Nuremberg regime established that the state immunity rule could no longer be pleaded to bar the trial and punishment of high-ranking state officials for international crimes in international tribunals, at least. This position was reaffirmed in the legal regime of the Tokyo Tribunal, as discussed next. It is also noteworthy that the UN General Assembly has

⁴⁰ See International Military Tribunal (Nuremberg), “*Judgment and Sentences, October 1, 1946*”, op cit, note 39 at 220.

⁴¹ Ibid at 220-221. See also El Zeidy, Mohammed M, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Leiden: Martinus Nijhoff, 2008) at 74-75; Knoop, Geert-Jan Alexander, *Defences in Contemporary International Criminal Law*, 2nd ed (Leiden: Martinus Nijhoff, 2008) at 21.

⁴² Emphasis supplied.

unanimously adopted the principles of the *Nuremberg Charter* as forming part of customary international law.⁴³

4.2.4 The *Tokyo Charter* Regime

One year after creating the Nuremberg Tribunal, the Allied Powers also set up the International Military Tribunal for the Far East (the “Tokyo Tribunal” or the “Khabarovsk War Crimes Trial”). This was done through the adoption of the *Charter of the International Military Tribunal for the Far East*⁴⁴ (“*Tokyo Charter*”). Like the *Nuremberg Charter*, the *Tokyo Charter* was adopted to try and punish the Far Eastern (mainly Japanese) war criminals for the same crimes for which the Nazis were tried, namely: crimes against peace, war crimes, and crimes against humanity.⁴⁵ The *Tokyo Charter* was, therefore patterned along the lines of the *Nuremberg Charter*.

With regard to the immunity of persons charged before the Tokyo Tribunal, article 6 of the *Tokyo Charter* provided thus:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

⁴³ *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, UNGA Res 95(1) (of 11 December 1946), UN Doc A/236 (1946). See also Crowe, Jonathan & Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Cheltenham, England: Edward Elgar Publishing, 2013) at 168; Kofele-Kale, Ndiva, *The International law of Responsibility for Economic Crimes* (Aldershot, England: Ashgate Publishing, 2006) at 318.

⁴⁴ (1946) 4 Bevens 21; also online: <<http://www.jus.uio.no/eng/services/library/treaties/04/4-06/military-tribunal-far-east.xml>>. This *Charter* was adopted pursuant to the *Special Proclamation by the Supreme Commander for the Allied Powers, Establishment of an International Military Tribunal for the Far East* (1946) 4 Bevens 20.

⁴⁵ *Tokyo Charter*, supra, note 44, art 5(a)-(c).

On the strength of this and other provisions of the Charter, the Tokyo Tribunal was able to try and punish some high-ranking Japanese state officials, who would have otherwise been protected by the state immunity rule before national courts.⁴⁶

4.2.5 The Legacy of the Old *Ad hoc* International Criminal Tribunal Mechanism

One significant legacy of this mechanism is that it demystified the state immunity rule and sought to eradicate the culture of criminal impunity among high-ranking state officials. For once, these officials were made to understand that they were not above the law and could be made personally accountable for their international crimes like ordinary individuals. The jurisprudence of the tribunals under this mechanism, therefore, laid some good foundation for the success of the efforts against state immunity. However, due, mainly, to the temporary nature of this mechanism, the need arose for a more permanent mechanism to carry on this legacy. This led to the re-invigoration of the universal criminal jurisdiction mechanism, which is examined next.

4.3 The Universal Criminal Jurisdiction Mechanism

When the Nuremberg and Tokyo Tribunals wound up, there were no other tribunals to administer international criminal justice on the international plane and to hold high-ranking state officials individually accountable for their international crimes by disregarding their immunity.⁴⁷

⁴⁶ See the International Military Tribunal for the Far East, *Judgment of 4 November 1948*, online: <<http://www.werle.rewi.hu-berlin.de/tokio.pdf>>. See also Boister, Neil & Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments* (Oxford: Oxford University Press, 2008); and, Boister, Neil & Robert Cryer, *The Tokyo International Military Tribunal: a Reappraisal* (Oxford: Oxford University Press, 2008).

⁴⁷ The subsequent *Convention on the Prevention and Punishment of the Crime of Genocide*, 1948, 78 UNTS 277 (“*Genocide Convention*”), inter alia, vested jurisdiction over genocide in an international tribunal and abolished immunity. See arts 6 and 4, respectively. However, no such tribunal existed until the creation of the ICTY, ICTR and ICC which are examined later.

In order partly to avoid the resultant proliferation of impunity among the officials for the commission of these crimes, the international community resorted to popularizing the universal criminal jurisdiction mechanism that had already been existing under customary international law.⁴⁸

Universal criminal jurisdiction is the adjudicatory competence of national judicial authorities of a state (as opposed to an international judicial body) with respect to international crimes occurring outside the territory of the state and with which the state has no connection.⁴⁹ By virtue of the universal jurisdiction mechanism, all states have jurisdiction to prosecute particular international crimes. This jurisdiction can be exercised whether the crimes are committed within or without the prosecuting state's territory and regardless of the accused person's nationality, state of residence, or any other relationship with the prosecuting state.⁵⁰ This mechanism may also apply to non-core international crimes like piracy and slavery.

The popularization of this mechanism at this time was done through the adoption of some instruments by the UN. The instruments affirm that the prohibitions on certain international crimes have attained the status of international custom and, therefore, make the crimes susceptible to the jurisdiction of the courts of all states. A leading instrument in this regard was the UN General Assembly *Resolution 95(1)* of 1946⁵¹. This resolution affirmed that the

⁴⁸ This mechanism, though relatively ineffective, was already existing in respect of specific international crimes like piracy and slavery. See, e.g., *Re Piracy Jure Gentium* (1934) AC 586 and *Convention against Slavery*, 1926, 60 LNTS 253, respectively.

⁴⁹ See Reydam's, Luc, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford: Oxford University Press, 2003) at 2, 38-39.

⁵⁰ Hesenov, Rahim, "Universal Jurisdiction for International Crimes – A Case Study" (2013) 93:3 Eur J Crim Policy Res 275 at 275; Zemach, Ariel, "Reconciling Universal Jurisdiction With Equality Before the Law" (2011) 47: Texas Int'l LJ 143 at 145; Lafontaine, Fannie, "The Unbearable Lightness of International Obligations: When and How to Exercise Jurisdiction under Canada's Crimes Against Humanity and War Crimes Act" (2010) 23:2 Revue Québécoise de Droit International 1 at 2; Langer, Maximo, "The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes" (2011) 105:1 AJIL 1 at 1.

⁵¹ *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, GA Res 95(1), 1946 (of 11 December, 1946).

principles of international law recognized in the *Charter of the Nuremberg Tribunal*⁵² are international custom. It should be recalled that the principles recognized in this *Charter* included the prohibitions on war crimes, crimes against humanity, crimes against peace (aggression), as well as the abolition of the immunity rule in the trials of these crimes. This invariably implies that pursuant to the universal jurisdiction mechanism, the state immunity rule should not bar the prosecution of a high-ranking state official for any of these crimes before a competent national court of another state. Another relevant instrument here is the *UN General Assembly Resolution on the Crime of Genocide*⁵³. This resolution affirms that the prohibition on the crime of genocide has also attained international customary law status and thus renders the crime susceptible to universal jurisdiction.

In addition to the general and unlimited form of universal jurisdiction that exists under customary international law, some international treaties also provide for some limited universal over specific international crimes. This treaty-based universal jurisdiction is limited because it is only effective as between the states parties to the respective treaties. Examples of these treaties are the *Torture Convention*⁵⁴ and the four *Geneva Conventions*⁵⁵. In order to actualize their universal jurisdiction goals, these treaties impose on contracting states an *aut dedere aut punire* obligation, i.e., subject to prosecutorial discretion, to prosecute or extradite an alleged offender to

⁵² Supra, note 33.

⁵³ GA Res 96(1), 1946 (of 11 December, 1946).

⁵⁴ 1984, 1465 UNTS 85, art 5(2). See also the ICTY in *Prosecutor v Furundzija*, Case No IT-95-17/1-T10, Trial Chamber Judgment, 10 December, 1998; Marks, Stephen P, “*The Hissene Habre Case: The Law and Politics of Universal Jurisdiction*”, in Macedo, Stephen (ed), *National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia, Pennsylvania: University of Pennsylvania Press, 2006) 131 at 146-167.

⁵⁵ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1949, 75 UNTS 31 (“*Geneva Convention I*”), art 49; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea* (1949) 75 UNTS 85 (“*Geneva Convention II*”), art 50; *Geneva Convention Relative to the Treatment of Prisoners of War*, 1949, 75 UNTS 135 (“*Geneva Convention III*”), art 129, para 2; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1949, 75 UNTS 287 (“*Geneva Convention IV*”), art 146, para 2. See also O’Keefe, Roger, “*The Grave Breaches Regime and Universal Jurisdiction*” (2009) 7:4 JICJ 811.

another state party which will prosecute him.⁵⁶ Following the universal jurisdiction trend, some states have also enacted national instruments that confer universal jurisdiction over some core international crimes upon their municipal courts.⁵⁷

4.3.1 Theoretical Foundation and Importance of the Universal Criminal Jurisdiction Mechanism in the Response against State Immunity

As already described in Chapter Three above, the theoretical foundation for universal jurisdiction is that the relevant crimes have attained the status of *jus cogens* and every state, therefore, has an entitlement *erga omnes* to bring their perpetrators to justice. Under this mechanism, the prosecuting state justifies its claim to jurisdiction on the grounds that the crimes are committed against all humanity and against the international community as a whole and are, therefore, too grave to tolerate.⁵⁸ The individual that commits the crimes is deemed “*hostis humani generis*” (enemy of all humankind) and every state has the jurisdiction to punish the crimes. According to Kenneth Randall⁵⁹:

⁵⁶ See, e.g., the *Torture Convention*, supra, note 54, arts 5-8, *Geneva Convention I*, supra, note 55, art 49; *Geneva Convention II*, supra, note 55, art 50; *Geneva Convention III*, supra, note 55, art 129, para 2; *Geneva Convention IV*, supra, note 55, art 146, para 2.

⁵⁷ See, e.g., the *Criminal Justice Act*, UKL 1988, c 33, art 134(1)(UK); *War Crimes Act*, UKL 1991, c 13, s 1 (UK); *Geneva Conventions Act*, UKL 1957, c52, s 1, as amended *Geneva Conventions (Amendment) Act*, UKL 1995, c27, s 1(1) (UK); *Genocide Accountability Act*, 2007, Pub L 110- 151, 121 Stat 1821 (2007), s 2(5) (US); *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, arts 6-8 (Canada); *Nazis and Nazi Collaborators (Punishment) Law*, No 5710, 1950, online: < <http://mfa.gov.il/MFA/MFA-Archive/1950-1959/Pages/Nazis%20and%20Nazi%20Collaborators%20-Punishment-%20Law-%20571.aspx>> (Israel). Scharf, Michael P, “*Universal Jurisdiction and the Crime of Aggression*” (2012) 53:2 *Harvard Int’l LJ* 357 at 359; Amnesty International, “*Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*” at 1, IOR 53/004/2011 (Oct. 2011); UN Secretary-General, “*Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments: The Scope and Application of the Principle of Universal Jurisdiction*”, U.N. Doc. A/65/181 (July 29, 2010) at 29.

⁵⁸ D’ Aspremont, Jean, “*Multilateral versus Universal Exercises of Universal Criminal Jurisdiction*” (2010) 43 *Israel LR* 301 at 302-303; Amnesty International’s *14 Principles on the Effective Exercise of Universal Jurisdiction*, Amnesty International May 1999AI Index: IOR 53/01/99 at 1.

⁵⁹ Randall, Kenneth C, “*Universal Jurisdiction under International Law*” (1988) 66 *Texas LR* 785 at 831. See also Arimatsu, Louise, “*Universal Jurisdiction for International Crimes: Africa’s Hope for Justice*”, Chatham House Briefing Paper, IL BP2010/01, April 2010 at 1; Hoover, Dalila V, “*Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court*” (2011) Cornell Law School Inter-University Graduate Student Conference Papers, Paper 52 at 4-5, also online: < http://www.scholarship.law.cornell.edu/lps_clap/52.

Violations of obligations *erga omnes* and *jus cogens* norms offend all States, whether committed by state actors or individuals. Indeed, domestic jurisdiction over those violations may draw support from the *Barcelona Traction* case dictum, which, although not without ambiguity, may support a type of *actio popularis*, enabling any state to vindicate rights common to all.... In this way, the *erga omnes* and *jus cogens* doctrines may buttress the universal jurisdiction of all States.⁶⁰

This mechanism is a crucial tool for bringing justice to victims, deterring state officials from committing international crimes, and establishing a minimum international rule of law by substantially closing the “impunity gap” for international crimes.⁶¹ One virtue of this mechanism is that it advocates disregard for the immunity of state officials who commit international crimes.⁶² The International Council on Human Rights Policy stresses this as follows⁶³:

Universal jurisdiction prosecutions illustrate effectively the basic principle that serious human rights violations are the concern of everyone, not just the people in the country where they were committed. When a foreign country decides to prosecute crimes that occurred in another land, regardless of whether its own nationals were victims, it demonstrates the international dimension to basic human rights. *The very fact that these prosecutions challenge traditional attributes of sovereignty and the immunity of leaders to commit grave abuses within their own national borders is a basis upon which prosecution should be advocated.*⁶⁴

The mechanism’s importance is also recognized in Amnesty International’s document titled “*Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction*”⁶⁵. In particular, *Principle 2* reflects the anti-immunity position of the universal

⁶⁰ See also *R v Bow Street Metropolitan Stipendiary Magistrates, Ex parte Pinochet Ugarte (No 3)* (the “Pinochet case”) (2000) 1 AC 147 at 288, paras F-G, per Lord Phillips.

⁶¹ Ibid. See also Amnesty International, “*Ending Impunity: Developing and Implementing a Global Action Plan Using Universal Jurisdiction*”, AI Index IOR 53/005/2009, Sept 30, 2009.

⁶² See, e.g., Coombes, Karinne, “*Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations*” (2011) 43:3 *George Washington IL Rev* 419 at 439.

⁶³ International Council on Human Rights Policy, *Hard Cases: Bringing Human Rights Violators to Justice Abroad: A Guide to Universal Jurisdiction* (Versoix, Switzerland: International Council on Human Rights Policy, 1999) at 16.

⁶⁴ Emphasis supplied.

⁶⁵ Amnesty International May 1999AI Index: IOR 53/01/99.

criminal jurisdiction mechanism, and is headed “*No immunity for persons in official capacity.*”⁶⁶ Its paragraph 1 states that “National legislatures should ensure that their national courts can exercise jurisdiction over anyone suspected or accused of grave crimes under international law, whatever the official capacity of the suspect or accused at the time of the alleged crime or any time thereafter.” Under paragraph 2, “Any national law authorizing the prosecution of grave crimes under international law should apply equally to all persons irrespective of any official or former official capacity, be it head of state, head or member of government ... or other elected or governmental capacity.”

Similarly, Principle 5 of the *Princeton Principles on Universal Jurisdiction*⁶⁷ provides as follows: “With respect to serious crimes under international law ..., the official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”

Pursuant to this mechanism, some former high-ranking state officials have been denied immunity before foreign courts for international crimes they committed while in office. For example, in *Attorney-General of the Government of Israel v Eichmann*⁶⁸, Israel invoked this mechanism and tried Adolf Eichmann, an ex-Nazi high-ranking official. Eichmann was the head of the Jewish office of the Nazi Gestapo. He was the administrator in charge of “the Final Solution” – the Nazi policy that led to the extermination of about 4,600,000 Jews in Europe. He was tried for war crimes, crimes against the Jewish people, and crimes against humanity, the

⁶⁶ Emphasis supplied.

⁶⁷ The Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* (Princeton, New Jersey: Program in Law and Public Affairs, Woodrow Wilson School of Public and International Affairs, Princeton University, 2001) at 31. These *Principles* promote exercise of universal jurisdiction over the following international crimes: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture. See *Principle 2(1)*.

⁶⁸ (1961) 36 ILR 5.

definitions of which were based on the Nuremberg principles. He was convicted, sentenced to death, and executed, notwithstanding his official capacity when he committed his crimes.⁶⁹

More recently, in the *Pinochet* case⁷⁰ earlier referred to, Augusto Pinochet was arrested in the UK on the basis of warrants issued by the Spanish courts and a Spanish extradition request. The warrants and request arose from his prosecution in Spain for torture and other international crimes he committed in his position as Chilean President between 1973 and 1990. He filed applications before the UK courts to quash the warrants, arguing that as a former head of state he was protected by the state immunity rule from foreign criminal prosecutions for acts done by him in his official capacity as head of state. Part of the counter-arguments of the appellants' counsel (Alun Jones, QC) on this position is instructive⁷¹:

The various laws of states considered in the light of the fact that every recent human rights treaty has prohibited torture provide evidence that customary international law prohibited torture before the Torture Convention and that, under customary international law, torture was an international crime if committed by a public official. There was no head of state exception and states other than the state where the offence took place were entitled to exercise jurisdiction.... Accordingly, either the Torture Convention establishes that the applicant can have no immunity from prosecution for acts of torture or alternatively the prohibition against torture has the status of jus cogens and he can be prosecuted under customary international law....

In a landmark judgment, the UK House of Lords held that the commission of torture could not be regarded as an official act for which a head of state should enjoy immunity under international law. The Court also said that such immunity was lost when Chile ratified the *Torture Convention* on 30th October 1988. For the Law Lords, the moment Pinochet stepped

⁶⁹ See also Mulisch, Harry, *Criminal Case 40/61, The Trial of Adolf Eichmann: An Eye Witness Account* (Pennsylvania, USA: University of Pennsylvania, 2005) at 1-16; Scharf, Michael P, "Joint Criminal Enterprise, the Nuremberg Precedent, and the Concept of Grotian Moment", in Isaacs, Tracy & Richard Vernon (eds), *Accountability for Collective Wrongdoing* (Cambridge: Cambridge University Press, 2011) 119 at 136; Yablonka, Hanna, *The State of Israel vs Adolf Eichmann* (Berlin: Schocken Books, 2004) at 1-300.

⁷⁰ Supra, note 60.

⁷¹ Ibid at 156, paras A-D.

down as Chilean head of state, he lost his immunity from foreign prosecution for his international crimes, including torture, committed while in office.⁷²

From the judgment in the *Pinochet* case, it is clear that the disregard of the state immunity rule under the universal criminal jurisdiction mechanism only applies to immunity *ratione materiae*. Thus, immunity *ratione personae* of sitting high-ranking state officials from prosecutions for international crimes is not abolished under this mechanism. Notwithstanding this, the judgment went a long way in inducing public confidence in universal criminal jurisdiction as a mechanism for responding to the problems arising from the application of the state immunity rule in the international criminal justice system. For once, the mechanism that had remained ineffective was given some practical effect. This would show sitting state officials entitled to immunity *ratione personae* that they are not eternally free from individual accountability for their international crimes before foreign courts. Their charges may be waiting for their exit from office. According to Naomi Roht-Arriaza:

The Pinochet cases established the legitimacy of transnational prosecutions based on universal ... jurisdiction, at least under some circumstances. They showed that the existing universal jurisdiction laws could actually be used, and touched off a new willingness by advocates and court to use them. They made clear that there are some limits on the immunity of government officials when hauled before national courts accused of international crimes. ... They strengthened the idea that proper accountability for such crimes is the business of justice everywhere, and that domestic laws enshrining unfair trials or shielding perpetrators are subject to outside scrutiny and cannot per se bind foreign courts. They yielded landmark jurisprudence in the highest national courts of a handful

⁷² For further reading, see Sison, G, “*A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity*” (2000) 76 Washington University LQ 1583; Pierson, C, “*Pinochet and the End of Immunity England’s House of Lords Holds that a Former Head of State is Not Immune for Torture*” (2000) 14 Temple ICLJ 263; Bianchi, Andrea, “*Immunity versus Human Rights: The Pinochet Case*” (1999) 10:2 EJIL 237; Roht-Arriaza, Naomi, “*The Pinochet Precedent and Universal Jurisdiction*” (2001) 35:2 New England L Rev 311; Waltz, S, “*Prosecuting Dictators: International Law and the Pinochet Case*” (2001) 18 WPJ 101; Byers, M, “*The Law and Politics of the Pinochet Case*” (2000) 10:2 Duke JCIL 415.

of countries, jurisprudence that both draws from international courts and ideas and feeds back into them.⁷³

Despite the recent popularization of this mechanism, it has always invariably remained ineffective. This is due to such factors as fear of deterioration in inter-state relations and the uncertain scopes and limits of the mechanism's immunity-removing regime. In order, partly, to avoid these shortcomings and the potential abuse in remitting these matters to national courts of dubious impartiality⁷⁴, the international community re-invented the *ad hoc* international criminal tribunal mechanism. This is the modern *ad hoc* international criminal tribunal mechanism, and is examined next.

4.4 The Modern *Ad hoc* International Criminal Tribunal Mechanism

On account, inter alia, of political unwillingness by states to try high-ranking officials of other states, the universal criminal jurisdiction mechanism was ineffective until recently, becoming more so now. For decades, most high-ranking state officials who committed heinous international crimes around the world escaped justice, and these crimes continued to flourish with impunity among these officials. As Alexandre Guerreiro states:

Despite the acceleration in legislative activity that followed the creation of the Tribunals at Nuremberg and Tokyo, *realpolitik* still loomed large over the protection of Human Rights, in such a manner that the world witnessed, for the first three decades of the Cold War, individuals acting blatantly against mankind without being punished.⁷⁵

In order partly to address this trend, the last decades of the twentieth century saw the establishment by the UN Security Council of two *ad hoc* international criminal tribunals. This

⁷³ Roht-Arriaza, Naomi, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Pennsylvania: University of Pennsylvania Press, 2005) at 197-198. See also Sriram, CL, *Globalizing Justice for Mass Atrocities: A Revolution in Accountability* (London: Routledge, 2005) at 30-37.

⁷⁴ As in the *Eichmann* case, *supra*, note 68.

⁷⁵ Guerreiro, Alexandre, "From Breisach to Rome: International Court's Long Road", *op cit*, note 7 at 32.

marked a revival of the ad hoc tribunal mechanism of international criminal justice administration. These two tribunals were the ICTY⁷⁶ and the ICTR⁷⁷. Their anti-immunity regimes are considered below.

4.4.1 The *ICTY Statute* Regime

The ICTY (“Tribunal”) was created by the UN Security Council in May 1993 pursuant to *Security Council Resolution 827*⁷⁸. This was done in direct reaction to the systematic atrocities being committed by all sides in the vicious conflict that was raging in the territory of the former Socialist Federal Republic of Yugoslavia (SFRY) since 1991.⁷⁹ The atrocities involved widespread violations of international humanitarian law and human rights in the SFRY, including the existence of concentration camps and the practice of “*ethnic cleansing*”⁸⁰. The ICTY is regulated by the *ICTY Statute*⁸¹ annexed to *Security Council Resolution 827*. It has jurisdiction to try and punish grave breaches of the *1949 Geneva Conventions* (violations of the laws and customs of war), genocide, and crimes against humanity that took place within the territory of the SFRY since 1991.⁸²

⁷⁶ Established pursuant to the *Statute of the International Criminal Tribunal for the Former Yugoslavia* (1993) UN Doc S/RES/827 (“*ICTY Statute*”). See Clark, Roger S & Madeleine Sann (eds), *The Prosecution of International Crimes: A Critical Study of the International Tribunal for the Former Yugoslavia* (New Brunswick, Canada: Transaction Publishers, 1996); ICTY, “*About the ICTY*”, online: < <http://www.icty.org/sections/AbouttheICTY> >.

⁷⁷ Created under the *Statute of the International Criminal Tribunal for Rwanda* (1994) UN Doc S/RES/955 (“*ICTR Statute*”).

⁷⁸ SC Res 827, UN Doc S/RES/827 (May 25, 1993).

⁷⁹ See e.g., Beigbeder, Yves, *International Justice Against Impunity: Progress and New Challenges* (Leiden: Martinus Nijhoff, 2005) at 69; Sikkink, Kathryn, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: WW Norton & Co, 2011) at 114; Steinberg, Richard H, “*Constructing the Legacy of the ICTY*”, in Steinberg, Richard H (ed), *Assessing the Legacy of the ICTY* (Leiden: Martinus Nijhoff, 2011) 3 at 3-4.

⁸⁰ “*Ethnic Cleansing*” is a modern term signifying an attempt by a particular state’s government to use state machinery to exterminate or obliterate members of a particular ethnic group within the state. This term originated from the massacres in the former Yugoslavia.

⁸¹ Supra, note 76.

⁸² Ibid, arts 1 – 10.

By article 7(2) of the *ICTY Statute*, “The *official position* of any accused person, *whether as Head of State or Government or as a responsible Government official*, shall not relieve such person of criminal responsibility nor mitigate punishment.”⁸³ Pursuant to this provision, the ICTY was able to successfully indict, prosecute, convict and sentence, many high-ranking state officials of the former Yugoslavia. In *Prosecutor v Milosevic*⁸⁴, Slobodan Milosevic (who served severally as President of the Socialist Republic of Serbia, Republic of Serbia, and the Federal Republic of Yugoslavia) was indicted on May 27, 1999 (while in office as President of the Federal Republic of Yugoslavia). His indictment was for genocide, crimes against humanity, grave breaches of the *Geneva Conventions*⁸⁵ of 1949, and other violations of the laws and customs of war. He, however, died in custody while standing trial.

The case of *Prosecutor v Milutinovic & Ors*⁸⁶ was a high-profile case involving the indictment and joint trial of five high-ranking officials of the former Yugoslavia. The accused persons were: Milan Milutinovic (ex President of Serbia) and Sainovic Nikola (a former Deputy Prime Minister of the Federal Republic of Yugoslavia – Serbia and Montenegro). Others were Dragoljub Ojdanic (ex-Chief of General Staff of the Yugoslav Army and Minister of Defence of the Federal Republic of Yugoslavia – Serbia and Montenegro) and three others. They were tried for various crimes against humanity and for violations of the laws and customs of war allegedly committed by them while in office. Milutinovic was acquitted by the Trial Chamber, Nikola was convicted and sentenced to twenty-two years’ imprisonment, while Ojdanic was also convicted

⁸³ Emphasis supplied.

⁸⁴ Case No: IT-02-54-T.

⁸⁵ Supra, note 55.

⁸⁶ Case No: IT-05-87-T.

but sentenced to fifteen years' imprisonment. The convicted persons' appeal is pending before the Appeals Chamber of the Tribunal.⁸⁷

In *Prosecutor v Karadzic*⁸⁸, Radovan Karadzic, who was at all material times the President of Bosnia, is at the time of writing being tried for war crimes and crimes against humanity. Karadzic was accused of presiding over the worst massacre in Europe since the Nazi-orchestrated Holocaust. He allegedly presided over the Srebrenica genocide of 1996 in which Bosnian Serb forces slaughtered more than seven thousand, five hundred Muslim men and boys. The Trial Chamber of the Tribunal acquitted him on one genocide charge for lack of sufficient evidence. The Prosecutor's appeal against this acquittal is, however, pending before the Appeals Chamber.⁸⁹

In addition to these cases, the Tribunal has indicted and tried many other high-ranking officials of the former Yugoslavia for international crimes committed while they were in office. In these other cases, some of the officials have been convicted and sentenced to prison, while some others have lodged appeals against their conviction. Others are still undergoing trial.⁹⁰

4.4.2 The ICTR Statute Regime

After the Rwandan genocide of 1994, the UN Security Council adopted the *United Nations Security Council Resolution 955 Establishing the International Criminal Tribunal for*

⁸⁷ See *Prosecutor v Nikola Saivonic & Ors*, Case No: IT-05-87-A.

⁸⁸ Case No.: IT-95-5/18-T.

⁸⁹ *Prosecutor v Karadzic*, Case No: IT-95-5/18-A.

⁹⁰ See e.g., *Prosecutor v Mladic*, Case No IT-09-92-T; *Prosecutor v Boskoski & Anor*, Case No IT-04- 82-A; *Prosecutor v Stanistic*, Case No IT-08-91-T. See generally ICTY, "Judgment List", online: < <http://www.icty.org/sec/tions/TheCases/JudgementList>>; Vukusic, Iva, "Judging Their Hero: Perceptions of the International Criminal Tribunal for the former Yugoslavia in Croatia", in Gow, James et al (eds), *Prosecuting War Crimes: Lessons and Legacies of the International Criminal Tribunal for the former Yugoslavia* (New York: Routledge, 2014) 151 at 157-163; Damgaard, Ciara, *International Criminal Responsibility for Core International Crimes: Selected pertinent Issues* (Berlin: Springer-Verlag, 2008) at 136-160.

Rwanda⁹¹ (“*UNSC Resolution 955*”). This *Resolution* established the ICTR or (the “Tribunal”).⁹² The *Resolution* was, inter alia, adopted in recognition of the shocking degree of genocide and other serious violations of international humanitarian law committed in Rwanda from January 1, 1994 to December 31, 1994.⁹³ The purpose of the Tribunal’s establishment was the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1 and December 31, 1994.⁹⁴ The Tribunal is also empowered to try Rwandan citizens responsible for such violations in the territories of neighbouring states.⁹⁵

The Tribunal is governed by the *ICTR Statute*⁹⁶ annexed to *UNSC Resolution 955*. The *Statute* confers the ICTR with jurisdiction over genocide; crimes against humanity; and violations of article 3 common to the *Geneva Conventions of 1949* and of the *Additional Protocol II* thereto, committed within the territories of Rwanda and its neighbouring states within the period under review.⁹⁷

Like in the *ICTY Statute*⁹⁸, article 6(2) of the *ICTR Statute* expressly removes immunity for high-ranking state officials. According to this provision, “The *official status* of any accused

⁹¹ *UNSC Res 955*, UN Doc./S/RES/955 (of November 8, 1994).

⁹² Ibid, para 1. See also Facts on File, “*International Criminal Tribunal for Rwanda (ICTR)*”, online: <http://www.fofweb.com/activelink2.asp?>; Wilson, Richard Ashby, *Writing History in International Criminal Tribunals* (Cambridge: Cambridge University Press, 2011) at 170-171.

⁹³ *UNSC Res 955*, supra, note 91, preamble. See also Coban-Ozturk, Ebru, “*Completing the Tribunal: ICTR’s Contributions and Deficiencies*”(2014) 10:4 Eur Sc J 36 at 36-43; Van der Herik, LJ, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Leiden: Martinus Nijhoff, 2005) at 262; Knittel, Claire, “*Reading between the Lines: Charging Instruments at the ICTR and the ICC*” (2012) 32:2 Pace LR 513 at 514.

⁹⁴ *UNSC Resolution 955*, supra, note 91, para 1. See also Lu, Irene C, “*Curtain Call at Closing: The Multi-dimensional Legacy of the International Criminal Tribunal for Rwanda*” (2013) 34:4 U Pa J Int’l L 859 at 859-860.

⁹⁵ *UNSC Resolution 955*, supra, note 91, para 1.

⁹⁶ Supra, note 77.

⁹⁷ Ibid, arts 2-4.

⁹⁸ Supra, note 76.

person, *whether as Head of State or Government or as a responsible Government official*, shall not relieve such person of criminal responsibility nor mitigate punishment.”⁹⁹

Based on these and other relevant provisions of the *Statute*, the ICTR has been able to indict, issue warrants of arrest against, try, convict, and sentence many high-ranking state officials, despite their official statuses at the time of commission of their alleged crimes. These indictments, arrest warrants, trials, convictions and sentences, it should be noted, would have most likely been impossible before foreign judicial tribunals due to the state immunity rule, at least while they were still sitting officials.

In *Prosecutor v Kambanda*¹⁰⁰, the Tribunal indicted Jean Kambanda (former Rwandan Prime Minister) on charges of genocide and crimes against humanity. He pleaded guilty and was sentenced to life imprisonment. In *Kambanda v Prosecutor*¹⁰¹, his appeal against conviction and sentence to the Tribunal’s Appeals Chamber was dismissed. He currently serves his sentence.

In *Prosecutor v Bizimungu & 3 Ors*¹⁰², the 1st accused, Casmir Bizimungu, was the Rwandan Minister of Health, while the 3rd accused, Jerome Bicomumpaka, was the Rwandan Minister of Foreign Affairs, when their alleged crimes were committed. They were indicted and tried, *inter alia*, for genocide, crimes against humanity and, war crimes. The Trial Chamber found Bizimungu guilty, but acquitted Bicomumpaka.

Also, in *Prosecutor v Nindiliyimana*¹⁰³, the 2nd accused person (Augustin Bizimungu) was the Rwandan Chief of Army Staff at the time the alleged crimes were committed. He and the

⁹⁹ Emphasis supplied. See also Daqun, Liu, “*Has Non-Immunity for Heads of State Become a Rule of Customary International Law*”, in Bergsmo, Mortein & Ling Yan (eds), *State Sovereignty and International Criminal Law* (Beijing: Torkel Opsahl Academic EPublisher, 2012) 55 at 58; Aksar, Yusuf, *Implementing International Humanitarian Law: From the Ad hoc Tribunals to a Permanent International Criminal Court* (London: Routledge, 2004) at 111.

¹⁰⁰ Case No ICTR-97-23-S.

¹⁰¹ Case No ICTR-97-23-A.

¹⁰² Case No ICTR-99-50-T.

¹⁰³ Case No ICTR-00-56-T.

other three accused persons were charged, inter alia, for genocide, crimes against humanity and war crimes. The Trial Chamber found them guilty and convicted and sentenced them to various terms of imprisonment. In particular, Bizimungu was sentenced to thirty years' imprisonment. An appeal¹⁰⁴ is still pending before the Appeals Chamber.¹⁰⁵

These trials, convictions and sentences serve as a warning to other high-ranking state officials around the world that the days of immunity from individual accountability for international crimes are gradually coming to an end. Official state positions may, therefore, no longer cloak them from accountability. Thus, the era of state-immunity-induced impunity, at least for international crimes under the *ad hoc* tribunals' jurisdiction is gradually passing by.

However, the weaknesses associated with the *ad hoc* international criminal tribunal mechanism, such as limited geographical/temporal jurisdictions and, at least as regards the ICTR, alleged lack of independence and impartiality¹⁰⁶ (which is an even bigger issue with respect to national tribunals), led the international community to a search for other response mechanisms.¹⁰⁷ One such mechanisms is the Hybrid Criminal Tribunal Mechanism, and it is considered next.

¹⁰⁴ Case No ICTR-00-56-A.

¹⁰⁵ In addition, the Tribunal has tried, convicted and sentenced many other Rwandan high-ranking state officials (who were acting in their official capacities at the time of their alleged crimes). See, e.g., *Prosecutor v Niyitegeka*, Case No ICTR-96-14-T; *Prosecutor v Nyiramasuhuko & Ors*, Case No ICTR-98-42-T; *Prosecutor v Karemera & Anor*, Case No ICTR-98-44-T; *Prosecutor v Kamuhanda*, Case No ICTR-95-54A-T; *Prosecutor v Ndindabahizi*, Case No ICTR-2001-71-I; and, *Prosecutor v Rwamakuba*, Case No ICTR-98-44C-T. Most of the affected officials are now serving their sentences in the prisons of various states which have agreed to offer such prison facilities.

¹⁰⁶ See, e.g., Goldstone, Richard J & Adam M Smith, *International Judicial Institutions: The Architecture of International Justice at Home and Abroad* (Oxford: Routledge, 2009) at 121; Hauschildt, Thomas, "The International Criminal Tribunal for Rwanda: Contribution to Reconciliation or Victor's Justice", *Conflict 7 Security*, May 26, 2014, online: <<http://conflictandsecurity.com/blog/the-international-criminal-tribunal-for-rwanda-contribution-to-reconciliation-or-victors-justice/>>.

¹⁰⁷ See, e.g., Nouwen, Sarah MH, "'Hybrid Courts': The Hybrid category of a New Type of International Crimes Courts" (2006) 2:2 *Utrecht L Rev* 190 at 190.

4.5 The Hybrid Criminal Tribunal Mechanism

More recently, a new species of criminal tribunals was ushered in. These are hybrid tribunals established by particular states or by the international community for particular states.¹⁰⁸ They are hybrid or internationalized because their enabling legal instruments empower them to exercise both international and domestic criminal jurisdictions and also to administer both international criminal law and the domestic criminal law of the state concerned.¹⁰⁹ They are, most often, staffed by both international and domestic judges and, in some cases, jointly administered by both the international community and the government of the state concerned.¹¹⁰ One remarkable and commendable feature of most of their enabling legal instruments is that they expressly abolish state immunity protection for high-ranking state officials. The details of their regimes against state immunity are set out below.

4.5.1 The *Statute of the Special Court for Sierra Leone*

The UN Special Court for Sierra Leone (SCSL) was established in January 2002, pursuant to the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*¹¹¹ (“SCSL Agreement”). The *Statute of the Special Court for Sierra Leone*¹¹² (“SCSL Statute”), which governs the operation of this Court, is

¹⁰⁸ See, e.g., Costi, Alberto, “Hybrid Tribunals as a Valid Alternative to International Tribunals for the Prosecution of International Crimes”, online: < <https://www.victoria.ac.nz/law/centres/nzcpl/publications/human-rights-research-journal/publications/vol-3/Costi.pdf> > at 1-2.

¹⁰⁹ OHCHR, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts* (New York: United Nations, 2008) at 1; Jain, Neha, “Conceptualising Internationalisation in Hybrid Criminal Courts” (2008) 12 SYBIL 81 at 82.

¹¹⁰ See Geib, R & Bulinckx, N, “International and Internationalized Criminal Tribunals: A Synopsis” (2006)88:861 IRRC 49 at 49-50; Dickinson, LA, “The Promise of Hybrid Courts” (2003)97 AJIL 259; Rapoza, P, “Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process” (2006) 21:4 AM U INT’L L REV 525.

¹¹¹ 2002, 2178 UNTS 138; UN Doc. S/2002/246, appendix II. See also DiBella, Amy E, “Witnessing History: Protective measures at the Special Court for Sierra Leone”, in Jalloh, Charles Chernor, *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge: Cambridge University Press, 2014) 423 at 424-425.

¹¹² 2002 2178 UNTS 138, 145; (2002) 97 AJIL 295; UN Doc. S/2002/246, appendix II.

annexed to the *SCSL Agreement*. The SCSL was created to try persons bearing the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone during Sierra Leone's gruesome ten-year civil war.¹¹³

Article 6(1) of the *SCSL Statute* entrenches individual responsibility. Under *article 6(2)*, immunity for high-ranking state officials is abolished. According to this paragraph, "The *official position* of any accused persons, *whether as Head of State or Government, or as a responsible government official*, shall not relieve such person of criminal responsibility nor mitigate punishment."¹¹⁴ This provision has enabled the SCSL to try and punish state officials that would otherwise have been shielded by the state immunity rule. In *Prosecutor v Taylor*¹¹⁵, the Appeals Chamber of the SCSL held that then Liberian President, Charles Taylor, could not invoke his head of state immunity to resist the charges against him before the Court, even though he was an incumbent head of state at the time of his indictment on March 7, 2003. Thus, Taylor was prosecuted, *inter alia*, for war crimes and crimes against humanity before the Trial Chamber of the SCSL. He was convicted on April 26, 2012.¹¹⁶ The Appeals Chamber dismissed his appeal on September 26, 2013.¹¹⁷ He currently serves a fifty-year jail term in the British prisons.¹¹⁸

Also in *Prosecutor v Norman & Ors*¹¹⁹, Samuel Hinga Norman (a then Sierra Leonean Deputy Defence Minister and serving Interior Minister at the time of indictment) was tried by the SCSL for crimes against humanity and war crimes. However, he died before delivery of

¹¹³ *SCSL Agreement*, *supra*, note 111, art 1; *SCSL Statute*, *supra*, note 112, art 1-5.

¹¹⁴ Emphasis supplied.

¹¹⁵ Case No SCSL-03-01-A, Appeal Chamber, May 31, 2004.

¹¹⁶ *Prosecutor v Taylor*, Case No. SCSL-03-01-T.

¹¹⁷ See judgment of the Appeals Chamber of the SCSL in *Prosecutor v Taylor*, Case No. SCSL-03-01-A (delivered on Sept 26, 2013).

¹¹⁸ Escritt, Thomas, "Liberia's Charles Taylor Loses Appeal Against War Crimes Conviction", Reuters, online: <<http://www.reuters.com/article/2013/09/26/us-war-crimes-taylor-appeal-idUSBRE98P0DP20130926>>.

¹¹⁹ Case No SCSL-03-14-I.

judgment in his case, which was thus terminated.¹²⁰ In *Prosecutor v Koroma*¹²¹, Jonny Paul Koroma (a former Sierra Leonean head of state) was indicted for crimes against humanity and war crimes and the SCSL issued a warrant for his arrest. However, the accused fled Sierra Leone before he could be arrested and was reported to have died in Liberia some months later.¹²²

4.5.2 The Statute of the Iraqi Special Tribunal / Law of the Iraqi Higher Criminal Court

The Iraqi Special Tribunal (the “IST” or the “Tribunal”) was established in 2003 pursuant to the *Statute of the Iraqi Special Tribunal*¹²³ (“IST Statute”). The IST was established through the UN influence in order to put an end to the Ba’ath Party’s regime in Iraq.¹²⁴

The IST has jurisdiction over Iraqi nationals and Iraqi residents accused of genocide, crimes against humanity, and war crimes.¹²⁵ The Tribunal also has jurisdiction over the following Iraqi national crimes: wastage of natural resources, manipulation of the judiciary, and abuse of policies leading to war against Iraq’s neighbours. The Tribunal’s temporal and geographical jurisdictions extend to the aforementioned crimes committed since July 17, 1968, and up until May 1, 2003, in the territory of Iraq or elsewhere, including crimes committed in connection with Iraq’s wars against Iran and Kuwait.¹²⁶

¹²⁰ See Nesbitt, Michael, “Lessons from the Sam Hinga Norman Decision of the Special Court for Sierra Leone: How Trials and Truth Commissions can Co-exist” (2007) 8:10 German LJ 977 at 978.

¹²¹ SCSL-03-03-I.

¹²² See Jalloh, Tanu, “Jonny Paul’s Dead Body Found in Liberia”, The Concord Times, Free Town, Liberia, September 11, 2008, online: <<http://www.allafrica.com/stories/200809110844.html>>.

¹²³ *Law No 1 of 2003* (2004) 42 ILM 231.

¹²⁴ See generally Bassiouni, Cherif M, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge: Cambridge University Press, 2011) at 696; Cryer, Robert et al, *An Introduction to International Criminal Law and Procedure*, 2nd ed (Cambridge: Cambridge University Press, 2010) at 194-195; Wald, PM, “Iraq, Cambodia and International Justice” (2006) 21:4 Am U Int’l L Rev 541.

¹²⁵ *IST Statute*, supra, note 123, arts 1(b), 10-14.

¹²⁶ Ibid. See also United States Institute for Peace, “Building the Iraqi Special Tribunal: Lessons from Experiences in International Criminal Justice”, online: <<http://www.usip.org/sites/default/files/sr122.pdf>>; Bassiouni, Cherif M, “Post-Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal” (2005) 99 Cornell ILJ 101 at 103-122.

Article 15(a) of the *IST Statute* establishes the individual responsibility of accused persons. Under article 15(c):

*The official position of any accused person, whether as president, prime minister, member of the cabinet, chairman or a member of the Revolutionary Command Council, a member of the Arab Socialist Ba'ath Party Regional Command or Government (or an instrumentality of either) or as a responsible Iraqi Government official or member of the Ba'ath Party or in any other capacity, shall not relieve such person of criminal responsibility nor mitigate punishment. No person is entitled to any immunity with respect to any crimes.*¹²⁷

In August 2005, the Iraqi Government changed the name of this Tribunal to the Iraqi Higher Criminal Court (also known as the Iraqi Higher Tribunal - IHT) via the *Law of the Iraqi Higher Criminal Court*¹²⁸ (“*IHT Law*”). The *IHT Law* repealed the *IST Statute* but saves all decisions made pursuant to the *IST Statute*.¹²⁹ The *IHT Law* virtually reproduces the content of the *IST Statute*, including jurisdiction. It only adds that pardons issued prior to the enforcement of the *IHT Law* do not apply to the accused in any of the crimes stipulated in the *IHT Law*.¹³⁰

Consequently, the IHT tried, convicted and sentenced many high-ranking Iraqi state officials who were in power at the time of the commission of their alleged crimes.¹³¹ In *Prosecutor v Hussein et al*¹³² (“*Al Dujail case*”), the accused persons included Saddam Hussein (ex Iraqi President) and Taha Yassin Ramadan (ex Iraqi Vice President and former General

¹²⁷ Emphasis supplied.

¹²⁸ Law No (10) of 2005. See also Newton, Michael A, “*The Iraqi High Criminal Court: Controversy and Contributions*” (2006) 88:862 IRRC 399.

¹²⁹ *IHT Law*, supra, note 128, arts 37 and 38. See also Center for the Study of Violence and Reconciliation, “*Iraq: The Iraqi Higher Criminal Court(Formerly the Iraqi Special Tribunal)*”, Justice in Perspective, January 2008, online: < <http://webfactory.co.za/csvr/csvr/middle-east/iraq/the-iraqi-higher-criminal-court-formerly-the-iraqi-special-tribunal.html>>; Solomon, Andrew, “*International Tribunal Spotlight: Iraqi High Criminal Tribunal*” (March 2006) 1:1 International Judicial Monitor, online: <http://www.judicialmonitor.org/archive_0306/spotlight.html>.

¹³⁰ *IHT Law*, supra, note 128, art 15, para 6.

¹³¹ See, e.g., Ralby, Ian M, “*Joint Criminal Enterprise Liability in the Iraqi High Tribunal*” (2010) 28 Boston University ILJ 281 at 283-285; Kuschnik, Bernhard, “*The Legal Findings of Crimes against Humanity in the Al-Dujail Judgments of the Iraqi High Tribunal: A Forerunner for the ICC?*” (2008) 7:2 Chinese JIL 459; Trahan, Jennifer, “*A Critical Guide to the Iraqi High Tribunal’s Anfal Judgment: Genocide Against the Kurds*” (2009) 30 Mich J Int’l L 305.

¹³² Case No IHT/1/9/First/2005, Trial Judgment (IHT, Nov 5, 2006).

Commander of the Iraqi Popular Army). They were charged before the IHT for various crimes against humanity, war crimes and genocide, found guilty, and sentenced to death. The IHT Appeals Chamber dismissed their appeal and confirmed their conviction and sentence.¹³³ They have since been executed.

Before the Appeals Chamber, one of Saddam Hussein's arguments against his conviction and sentence by the Trial Chamber was that the acts constituting his alleged crimes were performed in his official capacity as a head of state and were, therefore, protected by immunity in international law. The Chamber rejected this argument and held that immunity does not prevent the Court from exercising its jurisdiction. The Chamber's reasoning is as follows¹³⁴:

- 1) The law allows the trial of any person accused of committing a crime, regardless of his official capacity, even if he was a president or a member of government or of its council. His capacity does not excuse him from penalty and does not constitute extenuating circumstances. Immunity is the practical immunity which is related to the position held. Therefore, no one who committed crimes can claim that his acts are outside the law.
- 2) Immunity is not given to serve the interests of the person who holds the official position, but for the welfare of society, and should not violate international penal law.
- 3) If immunity constitutes a protective framework against prosecution, this principle was no longer recognized after World War II, and immunity has lost its effect since then. The establishment of criminal courts to try international crimes is an indication of the end of the immunity principle.

¹³³ *Prosecutor v Hussein et al (Al-Dujail case)*, Case No 29/c/2006, Appeal Judgment (IHT AC, Dec 26, 2006).

¹³⁴ *Ibid* at 9-10.

- 4) Immunity should be a reason for increasing the penalty rather than its mitigation, for a person who enjoys it usually exercises power which enables him to affect a large number of people, which intensifies the damages and losses resulting from commission of crimes.
- 5) The president of the state has international responsibility for the crimes he commits against the international community, since it is not logical and just to punish subordinates who execute illegal orders issued by the president and his aides, and to excuse the president who ordered and schemed for the commission of those crimes.

One interesting issue about this and similar cases is the fact that Hussein was in Iraq at the time of his trial, which means that state immunity as an international rule would not necessarily have been relevant. But because of the hybrid nature of the tribunal and the fact that it is not purely an Iraqi domestic court, the rule was relevant in the circumstance. Also, in *Prosecutor v Al-Majid et al*¹³⁵, the IHT tried Sultan Hashim Ahmed (Iraqi Defence Minister at all material times) for genocide, war crimes and crimes against humanity, found him guilty and sentenced him to death. The Appeals Chamber of the IHT also confirmed his conviction and sentence.¹³⁶

4.5.3 The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia

The Extraordinary Chambers in the Courts of Cambodia (the “Cambodia Tribunal”, or the “ECCC”, or the “Khmer Rouge Tribunal”) is established pursuant to the *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under*

¹³⁵ Case No 1/C/Second/2006, Trial Judgment (IHT 2nd Crim. Ct., Jun. 24, 2007).

¹³⁶ See *Prosecutor v Al-Majid et al (Anfal Campaign case)*, Appeal Judgment (IHT AC, Sep 4, 2007), online: <http://www.worldcourts.com/ist/eng/decisions/2007.09.04_Prosecutor_v_al_Majid_et_al.pdf>.

*Cambodian Law of Crimes Committed During the period of Democratic Kampuchea*¹³⁷ (“UN-Cambodia Agreement”). It was created to try the surviving most senior members of the *Khmer Rouge*¹³⁸ regime and other persons most responsible for violations of Cambodian and international penal law committed in Cambodia throughout this regime (between 17 April, 1975 and 6 January, 1979) and to provide justice to Cambodian victims of such violations.¹³⁹

The *UN-Cambodia Agreement* is implemented in Cambodia through the *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*¹⁴⁰ (“ECCC Law”). The *ECCC Law* provides the ECCC with subject-matter jurisdiction over violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia. It also confers on the ECCC personal jurisdiction over senior leaders of the Democratic Kampuchea.¹⁴¹

By article 9 of the *UN-Cambodia Agreement*¹⁴², the ECCC can, inter alia, try the following crimes: genocide¹⁴³, crimes against humanity¹⁴⁴ and grave breaches of the 1949 *Geneva Conventions*.¹⁴⁵ In article 29, the *ECCC Law* establishes the individual criminal

¹³⁷ 6 June, 2003, online: <<http://www.refworld.org/docid/4ba8e2ea9dc.html>>.

¹³⁸ The Khmer Rouge was the despotic communist party that ruled the *Democratic Kampuchea* (Cambodia’s name during this regime) between 1975 and 1979. It was led by Pol Pot, Nuon Chea, Ieng Sary, Son Sen, and Khieu Samphan. See Nhem, Boraden, *The Khmer Rouge: Ideology, Militarism, and the Revolution that Consumed a Generation* (Santa Barbara, Carolina, USA, ABC-CLIO, 3013) at xiii-xvii.

¹³⁹ *UN-Cambodia Agreement*, supra, note 137, preamble and art 1. See also International Bar Association, “Extraordinary Chambers in the Courts of Cambodia”, online: <http://www.ibanet.org/Committees/WCC_Cambodia.aspx>; Scully, Seeta, “Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia” (2011) 13:1 Asia-Pacific LPJ 300 at 308-321.

¹⁴⁰ 2002, NS/RKM/0801/12, as amended by *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, 2004, NS/RKM/1004/006, also online: <http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf>.

¹⁴¹ *UN-Cambodia Agreement*, supra, note 137, art 2. See also the *ECCC Law*, supra, note 140, arts 1 and 2.

¹⁴² See also the *ECCC Law*, supra, note 140, arts 3-8.

¹⁴³ As defined in the *Genocide Convention*, supra, note 47.

¹⁴⁴ As defined in the *Rome Statute of the International Criminal Court*, 1998, UN Doc A/CONF 183/9; 1998, 2187 UNTS 90.

¹⁴⁵ Supra, note 55.

responsibility of any suspect or accused person charged before the ECCC. It also establishes command responsibility.¹⁴⁶ The second paragraph of the same article 29 provides that “The *position or rank* of any suspect shall not relieve such person of criminal responsibility or mitigate punishment.”¹⁴⁷

Consequently, the ECCC has tried a number of high-ranking state officials of the former Khmer Rouge regime.¹⁴⁸ In *Prosecutor v Eav*¹⁴⁹, Kaing Guek Eav (also called “Kang Kek Iew”), who at all material times acted as the head of the Khmer Rouge internal security, was convicted and sentenced to imprisonment for thirty-five years. His trial was for various crimes against humanity and grave breaches of the *Geneva Conventions of 1949*. On February 3, 2012, the Supreme Court Chamber of the ECCC, in dismissing his appeal against conviction and sentence, not only confirmed his conviction but also increased his sentence to life imprisonment.

*Prosecutor v Sary & Ors*¹⁵⁰ deals with the trial of the following very high-ranking officials of the former Khmer Rouge regime: Ieng Sary (a Deputy Prime Minister), Khieu Samphan (a former President), and Noun Chea (chief ideologist of the Khmer Rouge and second in command to the former Khmer Rouge leader, Pol Pot). They are accused of committing crimes against humanity, grave breaches of the *Geneva Conventions of 1949*, and genocide. These are based on the part they played in “the killing fields” – the mass slaughter of their own people when this regime ruled. Ieng Sary died before his conviction and sentence, and so on

¹⁴⁶ *ECCC Law*, supra, note 140, art 29, paras 1 and 3.

¹⁴⁷ *Ibid*, art 29, para 2. Emphasis supplied.

¹⁴⁸ Cawley, Andrew, T, “*Prosecuting Mass Atrocities at the Extraordinary Chambers in the Courts of Cambodia (ECCC)*” (2012) 11:2/6 Wash U Glob Stud L Rev 445 at 446-458; Ryou, Kathleen, “*The Extraordinary Chambers in the Courts of Cambodia: Facilitating Cambodia’s Post-Conflict Transition and Recovery*” (November 18 2013) CUPID Online Journal, online: <http://www.columbiacupid.org/online-journal/the-extraordinary-chambers-in-the-courts-of-cambodia-facilitating-cambodias-post-conflict-transition-and-recovery>>.

¹⁴⁹ Case No: 001/18-07-2007-ECCC/SC.

¹⁵⁰ Case No: 002/19-09-2007-ECCC-TC

March 14, 2013, his trial was terminated by the Trial Chamber of the ECCC.¹⁵¹ Khieu Samphan and Noun Chea continue to stand trial for these crimes before the ECCC.

4.5.4 The *International Crimes (Tribunal) Act* in Bangladesh

The International Crimes Tribunal (the “ICT” or the “Bangladesh Tribunal”) is a hybrid criminal tribunal in Bangladesh. It was set up in 2009 to investigate and prosecute suspects in the genocide committed in Bangladesh in 1971 by the Pakistani Army and their Bangladeshi collaborators during the Bangladeshi war of liberation.¹⁵² The instrument that authorized its establishment has been in force since July 20, 1973¹⁵³. However, it remained dormant, as no tribunal was set up and no trial was conducted pursuant to it, until it was amended and reintroduced by an Act of the Bangladeshi Parliament in 2009.¹⁵⁴ Today, the operations of the Tribunal are governed by the *International Crimes (Tribunal) Act*¹⁵⁵, as amended (the “*ICT Amended Act*” or the “*Amended Act*”) after it was eventually established on March 25, 2010.¹⁵⁶

Although the ICT is a domestic tribunal, it deals exclusively with international crimes and in accordance with international law. The long title of the Act states its purpose as follows: “An Act to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law”.

¹⁵¹ Wong, Chun Han, “*Death Stirs Critics of Khmer Rouge Trials*” (March 14 2013) The Wall Street Journal, online: <<http://online.wsj.com/news/articles/SB10001424127887324077704578359341082308114>>.

¹⁵² See Rahman, Mizanur & SM Masum Billah, “*Prosecuting ‘War Crimes’ in Domestic Level: The Case of Bangladesh*” (2010) 1 Northern University JL 14 at 16.

¹⁵³ The *International Crimes (Tribunals) Act*, 1973, No. XIX.

¹⁵⁴ The *International Crimes (Tribunals) (Amendment) Act*, 2009, No. LV. See also Shahjalal, Mohammed, “*Bangladesh International Crime Tribunal for 1971 War: Justice or Vendetta? A Critical Study on Contemporary Issues under International Law*” (2013) 2:4 The Macrotheme Review 205 at 205-206.

¹⁵⁵ 1973, No. XIX, as amended in 2009.

¹⁵⁶ See the judgment of the ICT delivered on February 28, 2013 in *Chief Prosecutor v Sayeedi*, ICT-BD Case No 01 of 2011, at 7, para 14.

By article 3(1) of the *ICT Amended Act*, the Tribunal has power to try any individual or group of individuals of any nationality, who commits or has committed in Bangladesh, whether before or after the commencement of the *ICT Amended Act*, any of listed international crimes. These crimes include: crimes against humanity, genocide, war crimes, violation of any humanitarian rules applicable in armed conflicts as laid down by the *Geneva Conventions* of 1949¹⁵⁷, and any other crimes under international law.¹⁵⁸

Article 4 affirms the individual criminal responsibility of every person charged before the Tribunal. It also establishes command responsibility. Most interestingly, *article 5(1)* of the *Amended Act* provides that “The *official position, at any time*, of an accused person shall not be considered freeing him from responsibility or mitigating punishment.”¹⁵⁹

Although the Tribunal has conducted a couple of trials and handed down some convictions and sentences¹⁶⁰, so far there have been no trials and convictions of high-ranking state officials whose official status at the material times would have qualified them for state immunity. However, it is possible that such trials and sentences will come along, especially given the wide powers of the Tribunal under the *ICT Amended Act*. Again, the rule would not ordinarily have applied in these cases before Bangladeshi domestic courts if not for the hybrid status of the tribunal.

One of the major innovations introduced by the *ICT Amended Act* in the hybrid criminal tribunal mechanism is the expansion of the ICT’s substantive jurisdiction by including in the *Act’s* article 3(2)(f) a general power for the ICT to try “*any other crimes under international*

¹⁵⁷ See the *ICT Amended Act*, *supra*, note 155, art 3(2).

¹⁵⁸ Ibid; Afrin, Zakia, “*The International War Crimes (Tribunal) Act, 1973 of Bangladesh*” (2009) IYILP 341 at 344.

¹⁵⁹ Emphasis supplied. See also Garimella, Sai Ramani, “*The Bangladesh War Crimes Trials – Strengthening Normative Structure*” (2013) 13 JLPJ 27 at 29 and 33; *Chief Prosecutor v Alim*, ICT-BD Case No 01 of 2012 at 10.

¹⁶⁰ See e.g., *Chief Prosecutor v Ali Mujahid*, ICT-BD case No. 04 of 2012 (where a former Bangladeshi Welfare Minister – between 2001 and 2006 – was sentenced to death for crimes against humanity and genocide on July 17, 2013); and, *Chief Prosecutor v Molla*, ICT-BD Case No 02 of 2013, etc.

law”¹⁶¹. This is unlike most other hybrid tribunals whose jurisdictions are restricted to the core international crimes, i.e., genocide, war crimes and crimes against humanity (and aggression, in some cases). It is a commendable step that a hybrid tribunal has such unlimited substantive international criminal jurisdiction, implying that a high-ranking state official charged before it for any international crime beyond the core ones could still be stripped of immunity and subjected to full individual accountability.

4.5.5 The UNTAET Regulation on the Special Panels in East Timor

Upon the withdrawal of the Indonesian military forces in September 1999 from the occupation of East Timor, the UN set up the United Nations Transitional Authority (the “UNTAET”) to administer East Timor pending its independence in 2002.¹⁶² established an Investigative Commission (the “Commission”).¹⁶³ On 6 June 2000, the UNTAET established the Special Panels for Serious Crimes (SPSC) in East Timor. This was done through the adoption of the *UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*¹⁶⁴ (“UNTAET Regulation 2000/15” or “SPSC

¹⁶¹ Emphasis supplied.

¹⁶² See *UN Security Council Resolution 1272 (1999) on the Situation in East Timor*, S/RES/1272 (1999) (of 25 October 1999). See also Findlay, Mark J et al, *International and Comparative Criminal Justice: A Critical Introduction* (London: Routledge, 2013) at 94-95.

¹⁶³ International Bar Association, “*Special Panel for Serious Crimes (East Timor)*”, online: < http://www.ibanet.org/Committees/WCC_EastTimor.aspx>; Cohen, David & Leigh-Ashley Lipscomb, “*When More May be Less: Transitional Justice in East Timor*”, in Williams, Melissa S et al (eds), *Transitional Justice: NOMOS LI* (New York: New York University Press, 2012) 257 at 261-268.

¹⁶⁴ UNTAET/REG/2000/15 (of 6 June 2000). See also Ochoa, Juan Carlos S, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations* (Leiden: Koninklijke Brill NV, 2013) at 216-217; Chiam, Madelaine, “*Different Models of Tribunals*”, in Blumenthal, David A & Timothy LH McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance* (Leiden: Martinus Nijhoff, 2008) 205 at 212-216.

Regulation”). The SPSC has two sets of panels of judges: the trial Panels¹⁶⁵ and the appellate Panels¹⁶⁶. The Panels are composed of international and East Timorese judges.¹⁶⁷

The *SPSC Regulation* confers on the SPSC substantive jurisdiction over the following “serious offences” (crimes): genocide, war crimes, crimes against humanity, murder, sexual offences, and torture.¹⁶⁸ *Section 14* establishes individual criminal responsibility, and *section 15* totally abolishes the immunity rule in the following terms:

1. *The present regulation shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the present regulation, nor shall it, in and of itself, constitute a ground for reduction of sentence.*¹⁶⁹
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the panels from exercising its jurisdiction over such a person.

Although the Special Panels have recorded some convictions¹⁷⁰, no high-ranking state officials that would have benefitted from the immunity rule have so far been tried by the Panels.¹⁷¹ In any case, should they be brought to trial, it is clear in the provisions of the *Regulation* that they would not enjoy immunity. These provisions of the *SPSC Regulation* are, therefore, a step in the right direction in the fight against the evils of state immunity.

¹⁶⁵ The *SPSC Regulation*, *supra*, note 164, s 1(1).

¹⁶⁶ *Ibid*, s 1(2).

¹⁶⁷ *Ibid*, s 22.

¹⁶⁸ *Ibid*, s 1(3).

¹⁶⁹ Emphasis supplied.

¹⁷⁰ See, e.g., *General Prosecutor v Joao Fernandes*, Case No 001/00.C.G.2000; *General Prosecutor v Julio Fernandes*, Case No 002/00.C.G.2000.

¹⁷¹ Combs, Nancy Amoury, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* (California: Stanford University Press, 2007) at 115.

4.5.6 The *Statute of the Extraordinary African Chambers in the Courts of Senegal*

The Extraordinary African Chambers within the Courts of Senegal (“African Chambers” or the “Chambers”) is a hybrid criminal tribunal established within the national courts of Senegal.¹⁷² It is set up pursuant to the *Statute of the Extraordinary African Chambers within the Courts of Senegal*¹⁷³ (“*African Chambers Statute*”). The purpose of its creation is to try persons most responsible for serious international crimes committed in the Republic of Chad between 7 June 1982 and 1 December 1990.¹⁷⁴ It was principally established at the behest of the AU in order to bring to international criminal justice Hissene Habre, who was the Chadian President during the relevant period). Habre is accused of responsibility for the deaths of more than 40,000 people and torture of more than 20,000 during his eight-year rule of Chad from 1982 to 1990.¹⁷⁵ The Chambers were opened on February 8, 2013.¹⁷⁶

The Chambers, which have jurisdiction over the international crimes of genocide, crimes against humanity, war crimes, and torture¹⁷⁷, are composed of Senegalese and non-Senegalese judges appointed by the Senegalese government and the AU.¹⁷⁸ They are empowered to apply both the *Statute* and Senegalese law.¹⁷⁹ Article 10 of the *African Chambers Statute* affirms the individual criminal responsibility of accused persons, establishes the command responsibility of superiors, and abolishes immunity and the defence of superior orders. Particularly, article 10(3)

¹⁷² See Williams, Sarah, “*The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?*” (2013) 11:5 JICJ 1139 at 1144.

¹⁷³ 2013, online: <<http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers>>.

¹⁷⁴ Ibid, preamble, arts 1 and 3.

¹⁷⁵ International Justice Resource Center, “*Extraordinary African Chambers: Hybrid Court to Try Former Chad Dictator Hissene Habre*”, online: <<http://www.ijrcenter.org/2013/02/13/extraordinary-african-chambers-hybrid-court-to-try-former-chad-dictator-hissene-habre/>>. See also Boston University African studies Center/ West African Research Association, “*The Extraordinary African Chambers & the Trial of Hissene Habre: Why in Senegal and What Likely Benefits for Senegal and for Africa*”, online: <<http://www.bu.edu/wara/2014/04/29/the-extraordinary-african-exchange/>>.

¹⁷⁶ International Justice Resource Center, “*Extraordinary African Chambers: Hybrid Court to Try Former Chad Dictator Hissene Habre*”, op cit, note 177.

¹⁷⁷ The *African Chambers Statute*, supra, note 173, arts 4-8.

¹⁷⁸ Ibid, art 11.

¹⁷⁹ Ibid, art 16.

states regarding immunity that “*The official position of an accused, whether as Head of State or Government, or as a responsible government official, shall not relieve him or her of criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*”¹⁸⁰

These provisions have made possible the indictment and commencement of the trial of Hissene Habre for crimes against humanity, torture, and war crimes before the Chambers. Habre, who is also wanted by Belgium on similar charges pursuant to the universal jurisdiction mechanism, is now in pre-trial detention.¹⁸¹

4.5.7 The Legal Instruments of Other Hybrid Tribunals

Other tribunals under the hybrid criminal tribunal mechanism include the War Crimes Chambers in the Courts of Bosnia and Herzegovina, the War Crimes Chambers in the Courts of Croatia, and the War Crimes Chambers in the Courts of Serbia.¹⁸² However, the enabling legal instruments of these tribunals (all established in the breakaway republics of the former Yugoslavia) do not have express provisions on the abolition or disregard of the immunity rule.¹⁸³ The reason for this gap/omission may not be far-fetched. These War Crimes Chambers were established to help relieve the ICTY of its case load by trying some mid- and lower-ranking

¹⁸⁰ Emphasis supplied.

¹⁸¹ See Human Rights Watch, “*Q & A: The Case of Hissene Habre before the Extraordinary African Chambers in Senegal*”, online: <<http://www.hrw.org/news/2012/09/11/qa-case-hiss-ne-habr-extraordinary-african-chambers-senegal>>; Fox, Hazel & Philippa Webb, *The Law of State Immunity*, 3rd ed (Oxford: Oxford University Press, 2013) at 102; Foakes, Joanne, *The Position of Heads of State and Senior Officials in International Law* (Oxford: Oxford University Press, 2014) at 196.

¹⁸² See ICTY, “*Development of the Local Judiciaries*”, online: <http://www.icty.org/sid/10462>; Ljubojevic, Anna, “*Tomorrow People, Where is Your Past?*”: *Transnational Justice Mechanism and Dealing with Past in Serbia and Croatia*” (2010) 1 IJRLTJHR 78 at 83-84.

¹⁸³ See, e.g., *Law on Organization and jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes*, 2003, Official Gazette of the Republic of Serbia, No 67/2003, July 1, 2003; *Law on the Application of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts Against International Law on War and Humanitarian Law*, 2003, Official Gazette of the Republic of Croatia, No 175/2003, November 4, 2003.

accused persons that could not be tried by the ICTY, and to help continue the work of the ICTY beyond the end of its temporal mandate in 2010.¹⁸⁴ Thus, since the mid- and lower-ranking persons were not entitled to immunity in the first place, there is, therefore, no immunity to disregard.

However, this argument could still be faulted on the ground that it was not all the high-ranking officials indicted by the ICTY that could be tried before the ICTY completed its temporal mandate. Some are still at large.¹⁸⁵ Thus, whenever they are caught and charged before any of the War Crimes Chambers, the state immunity rule could be pleaded as a bar. Consequently, the omission should be quickly filled in.¹⁸⁶

4.5.8 Overview

The foregoing examination shows that, like the *ad hoc* international criminal tribunal mechanism, the hybrid criminal tribunal mechanism is capable of abolishing the state immunity rule by holding individually accountable for international crimes culpable high-ranking state officials who would have otherwise been shielded by the rule. The trials conducted by most of the hybrid tribunals reaffirm the position that the state immunity rule has seriously lost its strength in the international criminal justice system. Most of the accused persons, who were

¹⁸⁴ Institute for War & Peace Reporting, “*Introduction to the Balkan War Crimes Courts*”, online: < <http://iwpr.net/programme/international-justice-icty/introduction-balkan-war-crimes-courts>>; Weill, Sharon, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 48; Hanna, Michael Wahid, “*An Historical Overview of National Prosecutions for International Crimes*”, in Bassiouni, M Cherif, *International Criminal Law, 3rd ed, Vol III* (Leiden: Martunis Nijhoff, 2008) 297 at 321-323.

¹⁸⁵ Institute for War and Peace Reporting, op cit, note 184.

¹⁸⁶ Another hybrid criminal tribunal whose legal instrument does not also provide for the abolition or disregard of the immunity rule is the UN Special Tribunal for Lebanon. See the *Statute of the Special Tribunal for Lebanon*, attached to the *Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon*, which is annexed to the *UN Security Council Resolution 1757 (2007)*, UN Doc S/RES/1757 (May 30, 2007). Yet another is the UNMIK Regulation 64 Panels in Kosovo (which is now ended). See the *UNMIK Regulation No 2000/64 on Assignment of International Judges/Prosecutors and/or Change of Venue*, UNMIK/REG/2000/64 (of 15 December 2000). These two tribunals are not dealt with in this thesis.

once in absolute control of their state, are today being tried for atrocities they had committed many decades ago when they felt they would remain perpetually untouchable. This position shows that there is no more hiding place for persons who commit international crimes under the cover of official capacity. If they go free today, the nets of the international criminal justice system are likely to catch them tomorrow.

The next response mechanism is the Permanent International Criminal Court Mechanism. This is examined next.

4.6 The Permanent International Criminal Court Mechanism

On July 17, 1998, the *Rome Statute*¹⁸⁷ (“*ICC Statute*” or the “*Statute*”) which establishes the International Criminal Court (“ICC” or the “Court”) was adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.¹⁸⁸ The *ICC Statute* came into force on July 1, 2002.¹⁸⁹

Article 5 of the *Statute* vests the ICC with jurisdiction over persons responsible for “*the most serious crimes of concern to the international community as a whole*”¹⁹⁰. It lists these crimes as: genocide, crimes against humanity, war crimes, and the crime of aggression. Article 27 expressly abolishes immunity for any high-ranking state official charged before the Court. According to this article:

(1) This Statute shall apply equally to all persons *without any distinction based on official capacity. In particular, official capacity as Head of State or Government, a member of a Government or parliament, an elected representative or a government official* shall in no case exempt

¹⁸⁷ Supra, note 144, art 1.

¹⁸⁸ See Williamson, JA, “*An Overview of the International Criminal Jurisdictions Operating in Africa*” (2006) 88:861 IRRC 111 at 116; Cryer, Robert et al, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010) at 144-150.

¹⁸⁹ See The UN, “*Press Release L/T/4365*”, online: < <http://www.un.org/News/Press/docs/2002/LT4365.doc.htm>>.

¹⁹⁰ Emphasis supplied.

a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.¹⁹¹

(2) *Immunities or special procedural rules which may attach to the capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.*¹⁹²

Consequently, a head of state/government or any other high-ranking state official loses his immunity (*ratione personae* and *ratione materiae*) when indicted by or charged before the ICC. This has been described as clear confirmation of the new international law rule that individuals (no matter how highly placed) can no longer be absolved of international criminal responsibility (at least for the so-called “core international crimes”) by the state immunity rule. Fred Nkusi reiterates this outcome as follows¹⁹³:

Clearly, the provision [article 27 of the Rome Statute] generally eliminates both immunity *ratione personae* and immunity *ratione materiae* attached to state officials irrespective of their capacity in respect of international crimes. The ICC Statute removes expressly immunities of State officials including Heads of State or Government. Article 27 has become standard in the founding legal framework of international tribunals. Paragraph (1) of the provision does not address the issue of immunity accorded by international law to state officials, rather it addresses the substantive responsibility of state officials with respect to international crimes. Paragraph (2) explicitly waives international and national immunity. On this point, it can be underlined that immunities accorded to state officials, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person. Truly speaking, immunities of state officials who are state parties to the ICC Statute are subject to the jurisdiction of the ICC and the provision contains an automatic waiver of immunity entitled to them....¹⁹⁴

The prohibitions contained in article 27 against state immunity are complemented by those of articles 59 and 89 of the same *Rome Statute*. Under article 59, a state party which has

¹⁹¹ Emphasis supplied.

¹⁹² Emphasis supplied.

¹⁹³ Nkusi, Fred Kennedy, “Immunity of State Officials before the International Criminal Court (ICC): the Indictment of President Al-Bashir”, SSRN, September 16, 2013 at 4, online: <<http://papers.ssrn.com/sol3/papers.cfm?abstractid=2326370>> .

¹⁹⁴ See also Fox, Hazel & Philippa Web, *The Law of State Immunity*, 3rd ed (Oxford: Oxford University Press, 2013) at 557; Amnesty International, *Bringing Power to Justice: Absence of Immunity for Heads of State Before the International Criminal Court* (London: Amnesty International Publications, 2010) at 19-21.

received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance, inter alia, with its laws, and shall deliver him to the ICC once he is ordered to be surrendered. By article 89, the ICC may transmit a request for the arrest and surrender of an accused person to any state on the territory of which the person may be found, and states parties are required to co-operate by complying with the requests. By the combined effect of the two latter articles, a state party whose national is indicted by the ICC or on whose territory any person so indicted is found is obligated to arrest and surrender him to the ICC for prosecution at the ICC's request, notwithstanding his rank or political status. These articles clearly constitute a commendable innovation that the *ICC Statute* has introduced in the anti-state-immunity crusade of the international criminal justice system. As discussed in detail in the next chapter, however, the value of these and other commendable provisions of the *Statute* is currently affected by some adverse factors, including selective justice and external political and allied influences.

On the strength of the provisions of its *Statute*, the ICC has succeeded in indicting and commencing the prosecution of high-ranking officials from many states.¹⁹⁵ For example, in *Prosecutor v Al Bashir*¹⁹⁶, the ICC indicted Omar Hassan Al-Bashir (the incumbent President of Sudan) for war crimes, crimes against humanity, and genocide, and issued a warrant for his arrest. His charges are still pending before the ICC.¹⁹⁷ Meanwhile, by virtue of the indictment,

¹⁹⁵ See, e.g., International Criminal Court, “*All Cases*”, online: <[http://www.icc-cpi.int/en_menus/icc/situations and cases/cases/pages/casesindex.aspx](http://www.icc-cpi.int/en_menus/icc/situations_and_cases/cases/pages/casesindex.aspx)>; International Criminal Court, “*ICC – Structure of the Court – Office of the Prosecutor – Prosecutions*”, online: <[http://www.icc-cpi.int/en_menus/icc/structure%20the%20court/office%20of%20the%20prosecutor /prosecutions](http://www.icc-cpi.int/en_menus/icc/structure%20the%20court/office%20of%20the%20prosecutor/prosecutions)>; Coalition for the International Criminal Court, “*Cases and Situations*”, online: <<http://www.iccnw.org/?mod=casessituations>>.

¹⁹⁶ Case No ICC-02/05-01/09.

¹⁹⁷ Ibid.

the ICC asks all states to arrest and extradite Al-Bashir to the Court for trial.¹⁹⁸ New charges have also been leveled against him.¹⁹⁹

Also in *Prosecutor v Gombo*²⁰⁰, the ICC indicted and issued an arrest warrant against Jean Pierre Bemba Gombo, a former Vice President of the DRC, for crimes against humanity and war crimes he committed in the Central African Republic. He was consequently arrested by the Belgian authorities on May 24, 2008, and handed over to the ICC. He is currently standing trial at the Court for these crimes.

The situation in Kenya is not different. In *Prosecutor v Ruto & Anor*²⁰¹, the incumbent Kenyan Vice President, William Ruto, was charged with crimes against humanity committed during Kenya's post-presidential election violence of 2007. His trial is pending. Furthermore, in *Prosecutor v Kenyatta*²⁰², the Court, on March 8, 2011, issued summons to Uhuru Kenyatta, former Deputy Prime Minister and current President of Kenya, to appear before the Court for trial for crimes against humanity leveled against him. Kenyatta has submitted to the Court's jurisdiction and his trial is scheduled to proceed on 7 October 2014.²⁰³

In *Prosecutor v Gaddafi & Ors*²⁰⁴, the Court, *inter alia*, issued a warrant for the arrest and prosecution of the following high-ranking officials of Libya: Muammar Gaddafi (then Libyan head of state) and Saif Al-Islam Gaddafi (Libyan de facto Prime Minister). Their charges included crimes against humanity allegedly committed against the people of Libya between 15th and, at least, 28th February, 2011 (during the recent "Arab Spring") with the use of the Libyan

¹⁹⁸ See Elemo, Kadiri A, "Bye Bye the Reign of Impunity and Immunity: Al Bashir Indictment and Its Implications", online: <<http://www.voiceofmoria.com>>.

¹⁹⁹ *Prosecutor v Al Bashir*, Case No ICC-02/05-01/09-94 12-07-2010 4/30 SL PT.

²⁰⁰ Case No ICC-01/05-01/08.

²⁰¹ Case No ICC-01/09-01/11.

²⁰² Case No ICC-01/09-02/11.

²⁰³ See "ICC Postpones Kenyatta Trial to October", New Vision, 1 April 2014, online: <<http://www.newvision.co.ug/news/654091-icc-postpones-kenyatta-trial-to-october.html>>.

²⁰⁴ Case No ICC-01/11-01/11.

state apparatus and security forces. The case against Muammar Gaddafi was, however, terminated on November 22, 2011, following his death.²⁰⁵

On November 23, 2011, the ICC, in *Prosecutor v Laurent Gbagbo*²⁰⁶, issued a warrant of arrest against Laurent Gbagbo (former Prime Minister of Cote d'Ivoire) for four counts of crimes against humanity committed in the context of the post-electoral violence in Cote d'Ivoire between December 16, 2010 and April 12, 2011. According to the charges against him, Gbagbo bears individual criminal responsibility, as an indirect co-perpetrator, for these crimes. He was subsequently transferred to the ICC detention at the Hague by the Ivorian authorities and is now standing trial for these crimes.²⁰⁷ There are also a couple of similar cases pending before the Court against other high-ranking state officials.²⁰⁸

These cases show that the ICC mechanism's position against state immunity applies to both former and sitting high-ranking state officials. For example, although Jean Pierre Gombo and Laurent Gbagbo were charged as former officials, Muammar Gaddafi, Uhuru Kenyatta, and Omar al Bashir, were all sitting heads of state at the time of their respective charges. The charges against William Ruto were also brought against him as a sitting Vice President. This position leads to a re-visit of the raging controversy, which mainly arose from Al Bashir's indictment, as to whether article 27 of the *Rome Statute* actually ends the immunity *ratione personae* of state officials.²⁰⁹

²⁰⁵ See International Criminal Court, "*Situations and Cases*", online: <http://www.icc-cpi.int/EN_MENU/ICC/SITUATIONS%20AND%20CASES/Pages/situations%20AND%20cases.aspx>.

²⁰⁶ Case No ICC-02/11-01/11.

²⁰⁷ See International Criminal Court, "*All Cases*", op cit, note 195.

²⁰⁸ These other cases include: *Prosecutor v Abdel Raheem Muhammad Hussein*, Case No ICC-02/05-01/12 and *Prosecutor v Harun & Abd-Al-Rahman*, Case No ICC-02/05-01/07.

²⁰⁹ See, e.g., Barnes, Gwen P, "The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir" (2011) 34:6 Fordham ILJ 1584 at 1597; Williams Sarah & Lena Sherif, "*The Arrest warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court*" (2009) 14:1 JCSL 71 at 74-75; Mendes, Errol P, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Cheltenham, UK: Edward Elgar Publishing) at 174-176.

For the following reasons, this thesis argues that the article ends this class of immunity before the ICC. First, starting with the Nuremberg Tribunal era, it has been made clear that commission of international crimes does not qualify as an official act, and that there is no immunity, including *ratione personae*, before an international criminal tribunal. Second, part of the principal essence of the immunity *ratione personae* of a state official, as expressed in the Latin maxim: “*par in parem non habet imperium*”, is to preserve the dignity of his state by ensuring that its incumbent alter ego is not impleaded in the national courts of its equal.²¹⁰ However, it should be noted that the ICC is not a national court, but an international tribunal created to administer global criminal justice. Thus, the issue of preservation of state equality and dignity does not apply. Third, international crimes, at least the core ones, shock the whole world. Therefore, the exemption of a single culpable state official from accountability by immunity *ratione personae* should not take pre-eminence over the welfare, peace and security of the international community as a whole.

4.7 Conclusion

The various legal mechanisms adopted by the international community to respond to the problems of the application of the state immunity rule in the international criminal justice system have produced some positive results. They all denounce state immunity, and have succeeded in establishing that immunity should no longer shield a high-ranking state official from legal accountability for international crimes. Consequently, many high-ranking state officials, who would have, hitherto, escaped justice for their international crimes, have been, and can be subjected to the full wrath of international criminal law. For the future of the international

²¹⁰ See, e.g., Van Schaack, Beth, “*Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression*” (2012) 10:1 JICJ 133 at 149

criminal justice system, this means that the state immunity rule has lost its strength, and all its vestiges will soon be obliterated, at least, before the ICC and the *ad hoc*/hybrid tribunals, although immunity *ratione personae* still continues before national courts.

However, each of these mechanisms has some shortcomings that render it substantially ineffective. Again, the efforts on the abolition/disregard of state immunity in the international criminal justice system have some general shortcomings that make their objectives difficult to fully realize. All these are examined in detail in the next chapter.

CHAPTER 5

WEAKNESSES OF THE MECHANISMS OF LEGAL RESPONSE TO THE PROBLEMS OF STATE IMMUNITY IN THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

5.1 Introduction

Each of the mechanisms through which the international community has responded to the problems arising from the application of the state immunity rule in the international criminal justice system has made a positive impact in the system. In differing ways, each mechanism has attempted to ensure the individual criminal accountability of high-ranking state officials by the removal of the state immunity rule in its proceedings. The mechanisms have established the position that high-ranking state officials cannot hide under the cloak of state immunity to avoid international criminal responsibility today. However, these mechanisms also manifest some weaknesses, which hamper their effectiveness. The weaknesses include: selective justice; amenability to political and allied influences; limited geographical, temporal and substantive jurisdictional coverage; and lopsided focus on high-ranking officials of developing states. These weaknesses, which cumulatively undermine the goals of the anti-state-immunity efforts of the international criminal justice system, are examined in this chapter.

5.2 Weaknesses of the *Ad hoc* International Criminal Tribunal Mechanisms

As discussed in Chapter Four, the tribunals under this mechanism are: the International Military Tribunal (Nuremberg) (the “Nuremberg Tribunal”), the International Military Tribunal for the Far East (the “Tokyo Tribunal”), the International Criminal Tribunal for the former Yugoslavia (the “ICTY” or the “Yugoslavia Tribunal”), and the International Criminal Tribunal for Rwanda (the “ICTR” or the “Rwanda Tribunal”).

The positions taken against state immunity by the legal regimes of these tribunals have, without a doubt, gone a long way in curbing international criminal impunity among high-ranking state officials, since they enable the tribunals to try and punish these officials who would have otherwise been shielded from personal accountability by the state immunity rule. They have also provided justice for victims of international crimes committed by these officials within the tribunals' respective geographical areas of operation.¹

These achievements notwithstanding, the *ad hoc* international criminal tribunal mechanism has some patent and latent shortcomings that substantially undermine its response to the problems of state immunity. One of these shortcomings is that only a few states (mainly the world powers of each relevant time) have participated in the creation of the tribunals. Thus, the tribunals could be said to represent the parochial wishes of these few states at the given time, and not the general and democratic intention of the international community of states to bring to justice the international crimes of high-ranking state officials. For example, the special tribunal proposed to try Emperor Wilhelm II (ex-German Emperor) after World War I (the “Wilhelm Tribunal”) was to be set up by the Allied and Associated Powers to try the head of state of the leading Axis Power, Germany. The Nuremberg and Tokyo Tribunals were set up by the victorious Allied Powers after the Second World War.² The Yugoslavia Tribunal was created by

¹ See, e.g., Szpak, Agnieszka, “*Legacy of the ad hoc International Criminal Tribunals in Implementing International Humanitarian Law*” (2013) 4:9 Mediterranean JSS 525 at 525-530; Bailliet, Cecilia Marcela, “*The Legitimacy and Effectiveness of International Criminal Tribunal Conference*”, online: < <http://ilg2.org/2013/04/30/the-legitimacy-and-effectiveness-of-international-criminal-tribunals-conference/>>; Pillay, Navi, “*Celebrating International Criminal Justice, International Criminal Justice Day*”, The Hague, 8 July 2013, online: < <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13519&LangID=E>>; ICTY, “*Achievements*”, online: < <http://www.icty.org/sid/324>>; ICTJ, “*Impact of the Yugoslav and Rwanda Tribunals: Lessons for the International Criminal Court*”, online: < <https://www.ictj.org/news/impact-yugoslav-and-rwanda-tribunals-lessons-international-criminal-court-0>>; Darcy, Shane & Joseph Powderly, “*The International Criminal Tribunals and the Judicial Development of International Criminal Law*”, in Darcy, Shane & Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010) 1 at 1-16.

² See the *London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis*, 1945, 82 UNTS 279 (“*London Agreement*”), preamble and art 1; *Nuremberg Charter*, 1945, 82 UNTS 279, art 1;

the UN Security Council (with the influence of the five permanent members, namely, China, France, Russia, UK and US), and is a subsidiary organ of the Council.³ This is also the case with the Rwanda Tribunal.⁴

As well, the creation of the tribunals was dependent, at all times, on the political disposition of the international community (highly influenced by the interests of the world powers). Thus, in some cases, the international community deems it necessary to act. In others, it is silent. Consequently, the ability of the tribunals to respond to the problems of the state immunity rule and punish culpable high-ranking state officials so as to deter future perpetrators, is limited to situations where international power politics favour creating such tribunals. Therefore, when the international community does not deem it necessary to act, the crimes of other officials go unpunished, and their ultimate victims receive no justice.⁵

Furthermore, these tribunals and their enabling legal instruments are created and adopted, respectively, after the situations they are meant to address. The instruments empower the tribunals to try and punish crimes committed in the past.⁶ The tribunals apply *ex post facto* (after-the-fact/event) laws, and their operation could, consequently, be seen as violating the fundamental international human rights law principle of non-retroactivity of penal legislation,

Special Proclamation, Establishment of an International Military Tribunal for the Far East, 1946, TIAS No 1589; *Tokyo Charter*, 1946, TIAS No 1589, arts 1-2.

³ *United Nations Security Council Resolution 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia*, SC/Res/827 (1993) (of 25 May, 1993), UN Doc S/RES/827.

⁴ *United Nations Security Council Resolution 955 Establishing the International Criminal Tribunal for Rwanda (with Annexed Statute)*, SC/Res/955 (1994) (of November 8, 1994), UN Doc/S/RES/955.

⁵ See Kirsch, Philippe, “*The Role of the International Criminal Court in Enforcing International Criminal Law*” (2007) 22 *Am U Int’l L Rev* 539 at 540-541.

⁶ See, e.g., the *Treaty of Versailles*, 1919, 7 LNTS 332, arts 227, para 2; *Nuremberg Charter*, supra, note 2, arts 1 and 6; *Tokyo Charter*, supra, note 2, arts 1 and 5; *ICTY Statute*, 1993, UN Doc S/RES/827, preamble, arts 1, 8-9; and, *ICTR Statute*, 1994, UN Doc S/RES/955, preamble, arts 1, 7-8. See also Spiga, valentine, “*Non-retroactivity of Criminal Law: A New Chapter in the Hissene Habre Saga*” (2011) 9:1 JICJ 1; Ashworth, Andrew & Jeremy Horder, *Principles of Criminal Law*, 7th ed (Oxford: Oxford University Press, 2013) at 57; Bouchet-Saulnier, Francoise, *The Practical Guide to Humanitarian Law*, 7th English Language ed (Maryland, USA: Rowman & Littlefield, 2014) at 437-438; Cassese, Antonio, “*Balancing the Prosecution of Crimes Against Humanity and Non-retroactivity of Criminal Law*” (2006) 4:2 JICJ 410.

i.e., the *nullum crimen nulla poena sine lege* principle that has become part of the customary international law of criminal prosecution.⁷ This principle requires that a person should be tried and punished only for a crime that existed at the time of its alleged commission. In other words, the events brought before a criminal tribunal must constitute clearly defined crimes established in a previous law that precedes the tribunal, and the punishments for such crimes must also be stipulated in that preceding law.⁸ A typical instance of this violation relates to the controversy surrounding the jurisdiction exercised by the Nuremberg Tribunal over “crimes against humanity” committed by the Nazis before the adoption of the Tribunal’s legal instrument – ahead of crimes that was then unknown in international law.⁹ The danger in this practice is that the powers establishing these tribunals may indirectly use them to target high-ranking officials of some of their enemy states for punishment in respect of acts done in the remote past.

The allegation of retroactive criminal justice is countered on the ground that the crimes the tribunals punish(ed) are/were already existing under customary international law, except that

⁷ See, e.g., Ambos, Kai, *Treatise on International Criminal Law, Vol 1: Foundations and General Part*, 1st ed (Oxford: Oxford University Press, 2013) at 93-94; Lincoln, Jennifer, “Nullum Crimen Sine Lege in International Criminal Tribunal Jurisprudence: The Problem of the Residual Category of Crime” (2010-2011) 7:1 *Eyes on the ICC* 137 at 137-138; Crisan Iulia, “The Principles of Legality ‘Nullum Crimen, Nulla Poena Sine Lege’ and Their Role” (2010) 5 *Effectus* 1 at 1-3.

⁸ *International Covenant on Civil and Political Rights*, 1966, 999 UNTS 171 (“ICCPR”), art 15(1). See also Valiente, Alexandra, “The Illegality of the International Criminal Courts and Tribunals”, Libyan Revolutionary Committees Movement, Tuesday, August 14, 2012, online: <<http://rcmlibya.wordpress.com/2012/08/14/the-illegality-of-the-international-criminal-courts-and-tribunals/>>; Brown, Bartram S, “International Criminal Law: Nature, Origins and a Few Key Issues”, in Brown, Bartram S (ed), *Research Handbook on International Criminal Law* (Cheltenham, England: Edward Elgar Publishing, 2011) 3 at 5-6. Cryer, Robert et al, *An Introduction to International Criminal Law and Procedure*, 2nd ed (Cambridge: Cambridge University Press, 2010) at 79. See further Baytemir, Burcu, “The International Military Tribunal at Nuremberg: The Ongoing Reflections in International Criminal Law” (2010) 3 *USAK YIPL* 77 at 85; Thompson, David, “Ex Post Facto Law and the Nuremberg Trials”, Axis History Forum, 24 January 2003, online: <<http://forum.axishistory.com/viewtopic.php?t=15033>>; McDermott, Yvonne, “Rights in Reverse: A Critical Analysis of Fair Trial Rights under International Criminal Law”, online: <http://www.academia.edu/1091706/Rights_in_Reverse_A_Critical_Analysis_of_Fair_Trial_Rights_Under_International_Criminal_Law>.

⁹ See, e.g., Currie, Robert & Joseph Rikhof, *International & Transnational Criminal Law*, 2nd ed (Toronto: Irwin Law Inc, 2013) at 122-123

there were no international courts to punish them before the tribunals were created.¹⁰ For the modern ad hoc tribunals, this position is convincing. However, this could not be said with all certainty in relation to crimes against humanity for which the Nazi leaders and their Japanese allies were stripped of their immunity and tried and punished by the Nuremberg and Tokyo Tribunals.¹¹

Another major weakness of the *ad hoc* international criminal tribunal mechanism is that the tribunals' geographical jurisdictions are restricted to specific states or regions of the world. Consequently, even the heinous international crimes that they try, if they are committed outside the specified states or regions, do not come before them.¹² They are never meant to dispense universal and uniform international criminal justice. Thus, in states or regions outside their geographical jurisdictions, high-ranking state officials may continue committing international crimes *in perpetuum* and hiding under the veil of state immunity.

Similarly, their temporal jurisdictions are limited to given timeframes. For example, the Wilhelm Tribunal was intended to try Emperor Wilhelm II for international crimes committed during World War I.¹³ The Nuremberg and Tokyo Tribunals were created to try international crimes committed during the period of the Second World War - 1939 to 1945 - and no more.¹⁴ The ICTY was set up to prosecute persons most responsible for the serious international crimes committed in the territory of the former Yugoslavia since 1991¹⁵, i.e., throughout the period of

¹⁰ See, *ICCPR*, supra, note 8, art 15(2); Nsereko, Daniel D Ntanda, "The Evolution of International Criminal and the International Criminal Court in Context", an address delivered to the Parliament of Uganda on 26 September 2013 at the Parliament Building, Kampala, Uganda, at 12-13; Zhang, Jixi, "Fair Trial Rights in ICCPR" (2009) 2:4 JPL 39 at 43.

¹¹ See Currie & Rikhof, op cit, note 9; Cassese, Antonio, *International Criminal Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 106.

¹² See, e.g., the *ICTY Statute*, supra, note 6, art 8, and the *ICTR Statute*, supra, note 6, art 1.

¹³ The *Treaty of Versailles*, supra, note 6, preamble.

¹⁴ See *Nuremberg Charter*, supra, note 2, art 1 and *Tokyo Charter*, supra, note 2, art 1, respectively.

¹⁵ *ICTY Statute*, supra, note 6, preamble and art 1. See also ICTY, "Mandate and Crimes under ICTY Jurisdiction", online: < <http://www.icty.org/sid/320>>;

the Balkans war. It was required to complete all investigations by the end of 2004, all first instance trials by the end of 2008, and all work in 2010¹⁶, although the timelines were later extended.¹⁷ The ICTR was specifically established to try persons responsible for genocide and other heinous international crimes committed in Rwanda, and Rwandan citizens responsible for such crimes in neighbouring states, between 1 January 1994 and 31 December 1994.¹⁸

Consequently, even during a tribunal's lifetime, crimes within the tribunal's substantive and geographical jurisdictions that are committed by high-ranking state officials outside its temporal mandate are no business of the tribunal. With regard to such crimes, the immunity and impunity of such officials continue to thrive. All these mean that the tribunals do not possess the feature of continuity and permanence. They are invented to attend to certain exigencies within given timeframes, and their ad hoc nature renders them fugacious institutions unsuitable for a universal and global development of international criminal law.¹⁹

Another weakness of the mechanism is that the substantive jurisdictions of these tribunals were dictated by the peculiar historical exigencies and circumstances of each one's creation and its creators' mindsets at the particular point in time. Thus, substantive international crimes tried by one tribunal may not be within another's jurisdiction. For example, while the Nuremberg and Tokyo Tribunals had jurisdiction over crimes against peace²⁰ (aggression), the ICTY and ICTR

¹⁶ ICTY, "Completion Strategy: List of ICTY Completion Strategy Reports", online: < <http://www.icty.org/sid/10016> >.

¹⁷ See UN Security Council Resolution 1966 (2010) on the Establishment of the Residual Mechanism to Conclude Tasks of the International Criminal Tribunals for Rwanda, Former Yugoslavia, S/RES/1966(2010) (of 22 December 2010).

¹⁸ ICTR Statute, supra, note 6, preamble and art 1.

¹⁹ See, e.g., Skulic, Milan, "A View of ICTY and Its Place in History", in Ciric, Jovan (ed), *The Hague Tribunal: Between Law and Politics* (Belgrade, Serbia: Institute of Comparative Law, 2013) 56 at 59. Sievert, Ron, "A New perspective on the International Criminal Court: Why the Right Should Embrace the ICC and How America Can Use It" (2006) 68 University of Pittsburgh L Rev 77 at 101 and 118.

²⁰ Nuremberg Charter, supra, note 2, art 6(a), and Tokyo Charter, supra, note 2, art 5(1).

lack such jurisdiction. On the other hand, the ICTY and ICTR could try the crime of genocide²¹, which had not been formulated when their Nuremberg and Tokyo counterparts were established.

Finally, most of the *ad hoc* tribunals are alleged to administer “victor’s justice”. In other words, they were/are post-conflict institutions set up by the winning parties to conflicts to try and punish individuals of the losing parties. The tribunals were/are, therefore, enmeshed in partiality and selective justice. As a result, the trial and punishment of high-ranking state officials do not involve, or involve insufficiently, the victorious parties, no matter the enormity of their own crimes.²² For example, the Wilhelm Tribunal was proposed by the Allied and Associated Powers specifically to try the German Emperor, the head of the vanquished Axis Powers, who was even identified by his personal name in the enabling legal instrument of the proposed tribunal.²³ No provision was made in this instrument for the trial of high-ranking officials of member states of the Allied and Associated Powers, who must have also committed their own crimes in the course of the war. The Nuremberg and Tokyo Tribunals were created by the victorious Allied Powers²⁴ after World War II, exclusively and expressly to try and punish individuals (high-ranking officials) belonging to the defeated Axis Powers²⁵. High-ranking officials of the Allied and Associated Powers (who committed terrible crimes during the war) were never brought to

²¹ *ICTY Statute*, supra, note 6, art 4, and *ICTR Statute*, supra, note 6, art 2.

²² See Davidovic, Maja, “*How International is International Criminal Justice?*”, E-International Relations, April 22, 2014, online: <<http://www.e-ir.info/2014/04/22/how-international-is-international-criminal-justice/>>; Schabas, William, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012) at 93-97; Waldorf, Lars, “*A Mere Pretense of Justice: Complementarity, Sham Trials, and Victors’ Justice at the Rwanda Tribunal*” (2011) 33:4 *Fordham Int’l LJ* 1221 at 1224-1229; Tanaka, Yuki et al (eds), *Beyond Victors’ Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff, 2011); Meernik, James, “*Victors’ Justice or the Law?: Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia*” (2003) 47:2 *JCR* 140.

²³ *Treaty of Versailles*, supra, note 6, art 227, para 1.

²⁴ US, UK, France, USSR, and China.

²⁵ Germany and its allies.

justice.²⁶ Speaking of the Nuremberg trials, for instance, Burcu Baytemir²⁷ highlighted this problem as follows:

... while considering the criticisms of “victor’s justice”, it was reminded that *the judges were all nationals of the conquering nations. Moreover, the governing law in the Chamber has not been equally applied. The standard of guilt has been applied only to the defeated nations. For instance, the Russians were not forced to defend their operations in Finland or Poland. Like the Russians, the Americans were not required to justify Hiroshima.* This inequality ... is the product of a primitive international order. The victor has applied a unilateral standard in ... dealing with traditional war crimes.²⁸

Allegations also abound that high-ranking officials and soldiers of the North Atlantic Treaty Organization (NATO) member states committed war crimes during the Yugoslavian war that resulted in the ICTY’s creation.²⁹ However, none of these NATO officials or soldiers was ever charged by the ICTY. Only high-ranking officials of Yugoslavia were stripped of their immunity before the Tribunal and tried and punished.³⁰ Also, allegations exist to the effect that some high-ranking officials of France and the UK were involved in the Rwandan genocide that gave rise to the creation of the ICTR.³¹ Yet, none of them has ever been indicted before the

²⁶ See, e.g., Henry, Nicola, *War and Rape: Law, Memory and Justice* (Oxford: Routledge, 2011) at 23-24; Parish, Matthew, *Mirages of International Justice: The Elusive Pursuit of a Transnational Legal Order* (Cheltenham, England: Edward Elgar Publishing, 2011) at 86-125; Sellars, Kirsten, “*Imperfect Justice at Nuremberg and Tokyo*” (2010) 21:4 EJIL 1085 at 1098; Wald, Patricia M, “*Running the Trial of the Century: The Nuremberg Legacy*” (2006) 27:4 Cardozo L Rev 1559 at 1560.

²⁷ Baytemir, Burcu, “*The International Military Tribunal at Nuremberg: The Ongoing Reflections in International Criminal Law*”, op cit, note 8 at 86.

²⁸ Emphasis supplied.

²⁹ See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, online: <<http://www.icty.org/sid/10052>>. See also Fenrick, WJ, “*Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*” (2001) 12 EJIL 489; Cohn, Marjorie, “*NATO Bombing of Kosovo: Humanitarian Intervention or Crime Against Humanity*” (2002) 15 IJSL 79.

³⁰ See International Criminal Tribunal for the former Yugoslavia, “*The Cases*”, online: <<http://www.icty.org/action/cases/4>>.

³¹ Cameron, Hazel, *Britain’s Hidden Role in the Rwandan Genocide: The Cat’s Paw* (New York: Routledge, 2013); Cameron, Hazel, “*British State Complicity in Genocide: Rwanda 1994*” (2012) 1:1 State Crime 70; Cumberland, Fiona, “*France: Proud of Her Role During the Rwandan Genocide?*”, E-International Relations, June 4, 2012, online: <<http://www.e-ir.info/2012/06/04/france-proud-of-her-role-during-the-rwandan-genocide/>>; Wallis, Andrew, *Silent Accomplice: The Untold Story of France’s Role in the Rwandan Genocide* (London: IB Tauris & Co, 2007); Stam, Robert & Ella Shohat, *Flagging Patriotism: Crises of Narcissism and Ant-Americanism* (New York:

ICTR. Again, it is only high-ranking Rwandan officials who have been stripped of their immunity by the Tribunal and tried and sentenced to various forms of punishment.³²

Besides, even among culpable officials of the losing parties, there is still selectivity as to whom to try and punish. In some instances, a tribunal will only proceed against a party's official when none of the victorious powers is interested in protecting him. Where any of the powers has some political, economic, or allied interests in protecting him or her, he or she would be exempted from the tribunal's state-immunity-removing regime and from personal accountability for his or her alleged international crimes. For example, during World War II, Emperor Hirohito of Japan (then Japanese head of state and Supreme Commander) was alleged to have personally approved all his country's barbaric military ventures.³³ However, the Allied Powers decided to exempt him from trial before the Tokyo Tribunal due to the interests of some members of this group, particularly the US, while other Japanese officials were tried and punished.³⁴ Kingsley Moghalu³⁵ captures the scenario of this exemption as follows:

... The element that has chiefly triggered the ambivalence of historians toward the Tokyo war crimes trials is the extent to which the commitment to justice was compromised by the double standard of the political and strategic considerations of the Allied Powers.... The Chief prosecutor of the IMTFE ... made the most important decision of the Tokyo trial process. That decision – a deliberate and political, rather than judicial one – was to exempt Hirohito, the emperor of Japan, from prosecution for war crimes even as the country's military, the political leadership, and even Hirohito's royal household faced trial. Britain supported the U.S. position, but the Soviet Union insisted on a trial of the emperor. In Tokyo, even far

Routledge, 2007) at 204-205; Melvern, Linda R, *A People Betrayed: The Role of the West in Rwanda's Genocide* (London: Zed Books, 2000).

³² See ICTR, "Status of Cases", online: <<http://www.unictr.org/cases/tabid/204/Default.aspx>>.

³³ Ogbu, Osita N, "The International Criminal Court and Crimes Against Humanity" (2006) 4 IULJ 114 at 122; Huang, Joseph, "Hirohito, Mastermind of Japanese Involvement in World War II", Hope of Israel Ministries, online: <<http://www.hope-of-israel.org/hirohito.htm>>; Bix, Herbert P, "Emperor Hirohito in 20th Century History: The Debate Rekindles", JPRI Working Paper 92 (June 2003), online: <<http://www.jpri.org/publications/workingpapers/wp92.html>>.

³⁴ Moghalu, Kingsley Chiedu, *Global Justice: The Politics of War Crimes Trials* (Connecticut, US: Praeger Security International, 2006) at 41-47.

³⁵ Ibid at 41-42.

more than at Nuremberg, America was the dominant ally and its position naturally prevailed.³⁶

A similar weakness is that some of the tribunals were/are influenced by external political manipulation by the creating parties, so that they lack judicial independence.³⁷ This is seen in the fact that the judges of the earlier tribunals were selected from among nationals of the victorious powers and their allies, specifically the Wilhelm, Nuremberg, and Tokyo Tribunals. The Wilhelm Tribunal was to be composed of five judges, one appointed by each of the allied and associated powers, namely, the US, UK, France, Italy and Japan.³⁸ The Nuremberg Tribunal consisted of four members (judges), each with an alternate. One member and one alternate was appointed by each of the signatories³⁹ (allied powers) to the Tribunal's legal instrument.⁴⁰

It is defensible to argue that the appointing powers would only appoint judges who would act their script and do the bidding of the appointing Powers. Thus, the independence and impartiality of these tribunals was not guaranteed. Worse, the *Nuremberg Charter*, for example, makes the Nuremberg Tribunal unquestionable by providing that "Neither the tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their counsel."⁴¹ This practice clearly breaches the fair trial rule of natural justice, in particular, the principle of "*nemo iudex in causa sua*" (no person can judge a case in which he or she is a party

³⁶ See also Crowe, David M, *War Crimes, Genocide, and Justice: A Global History* (New York: Palgrave Macmillan, 2014) at 195-241; Jin, Kim, "America's Shielding of Emperor Hirohito Behind Japan's Denial of History (*JoonAngIlbo*, South Korea)", WorldMeets.US, May 1, 2013, online: < <http://worldmeets.us/joongangdaily000055.shtml#U7C9s5RdVA0>>; Igarashi, Yoshikuni, *Bodies of Memory: Narratives of War in Postwar Japanese Culture, 1945-1970* (Princeton, New Jersey, USA: 2000) at 38-39.

³⁷ See, e.g., Bachmann, Klaus, *When Justice Meets Politics: Independence and Autonomy of Ad Hoc International Criminal Tribunals* (Frankfurt, Germany: Peter Lang GmbH, 2013) at 105-390; Jodoin, Sebastien, "Understanding the Behaviour of International Courts: An Examination of Decision-Making at the Ad Hoc International Criminal Tribunals" (2010) 6:1 JILIR 1 at 33.

³⁸ *Treaty of Versailles*, supra, note 6, art 227, para 2.

³⁹ These were USA, France, UK and the USSR. See *Nuremberg Charter*, supra, note 2, art 1.

⁴⁰ *Nuremberg Charter*, supra, note 2, art 2.

⁴¹ *Ibid*, art 3.

or in which he or she has an interest).⁴² By establishing these Tribunals and appointing their nationals as the judges to try those they defeated in conflicts, the appointing states have become judges in their own causes. Overall, one could argue that the anti-state-immunity efforts made through some of these tribunals, by the victors, were not done in good faith.

Like the *ad hoc* international criminal tribunal mechanism, the universal criminal jurisdiction mechanism also has its peculiar weaknesses, which will be examined next.

5.3 Weaknesses of the Universal Criminal Jurisdiction Mechanism

There is no gainsaying that the universal criminal jurisdiction mechanism could be the best response to the problems of state immunity in the international criminal justice system. This is because it offers the advantage of multiple jurisdictional choices for bringing to justice state officials who commit international crimes. Ideally, the national courts of most states could compete to subject culpable officials to justice: if the judicial system of one state is not ready or able to try the officials in question, the courts of other states may be ready and able to do so.⁴³ This is one reason supporters of universal jurisdiction maintain that such jurisdiction is needed despite the creation of other international criminal law enforcement mechanisms. These supporters see the *ad hoc* international criminal tribunals created by the UN Security Council and

⁴² Malysz, Piotr J, “*Nemo Judex in Causa Sua as the Basis of Law, Justice, and Justification in Luther’s Thought*” (2007) 100:3 HTR 363; Ho, Joshua, “*Judicial Biasness: Nemo Judex in Causa Sua*”, Academia.edu, 2013, online: < http://www.academia.edu/6692080/Judicial_Biasness_Nemo_Judex_In_Causa_Sua>.

⁴³ Hesenov, Rahim, “*Universal Jurisdiction for International Crimes: A Case Study*” (2013) 19 Eur J Crim Policy Res 275 at 276; United Nations General Assembly, *The Scope and Application of the Principle of Universal Jurisdiction: Report of the General Secretary*, A/66/93 (20 June 2011) at 17, also online: < http://www.fd.uc.pt/igc/pdf/mne/varios/uj_3.pdf>; Bassiouni, Cherif M, *International Criminal Law*, 3rd ed, Vol II: *Multilateral and Bilateral Enforcement Mechanisms* (Leiden: Martinus Nijhoff, 2008) at 220; AGhenitei, Mihaela, “*Universal Jurisdiction and Concurrent Criminal Jurisdiction*”, online: < http://www.internationallawreview.eu/fisiere/pdf/Mi_ahela-Aghenitei_1.pdf> at 2.

the ICC as able to try only a handful of participants in international crimes owing to the expense of their proceedings and their limited territorial, temporal and personal jurisdictions.⁴⁴

Opponents of this broad use of universal jurisdiction contend that it has one major potential danger. This is the likelihood of its manipulation by states against sitting high-ranking officials of enemy states who benefit from immunity *ratione personae*. They argue that mere political rivalry among states can lead to the risk of one state trying to lift the immunity of sitting officials of another state by baselessly commencing international criminal proceedings in the national courts of the former state.⁴⁵

The advantage of multiple jurisdictional choices offered by this mechanism may outweigh its shortcoming mentioned in the preceding paragraph. Even so, it has features that undermine its effectiveness in confronting the problems of the state immunity rule. First, though the legal instruments under which this mechanism is adopted disclose that state immunity should not be a barrier to the prosecution and punishment of the crimes they prohibit, this intention is not expressly declared in some of the instruments. National courts are thus left with the difficult task of inferring these intentions by means of judicial interpretation.⁴⁶ This situation may lead to inconsistent practice among national courts. Thus, in circumstances where the courts of one state may deny immunity, the courts of another state may still grant immunity. In *R v Bow Street Stipendiary Magistrates, ex parte Pinochet Ugarte*⁴⁷ (No 3) (the “Pinochet case”), for example, part of the dissenting opinion of Lord Phillips states as follows:

⁴⁴ Langer, Maximo, “*The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*” (2011) 105:1 AJIL 1 at 3; Wolfgang Kaleck, “*From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*” (2009) 30 Mich Int’l LJ 927, 930-31.

⁴⁵ Boggero, Giovanni, “*Without (State) Immunity, No (Individual) Responsibility*” (2013) 5:2 Gottingen JIL 375 at 381.

⁴⁶ See Langer, Maximo, *op cit*, note 44 at 3

⁴⁷ (2000) 1 AC 147 at 289, paras D-E.

Where states, by convention, agree that their national courts shall have jurisdiction on a universal basis in respect of an international crime, *such agreement cannot implicitly remove immunities ratione personae that exist under international law. Such immunities can only be removed by express agreement or waiver.*⁴⁸ Such an agreement was incorporated in the Convention on the Prevention and Suppression of the Crime of Genocide 1948, which provides: “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals.” *Had the Genocide Convention not contained this provision, an issue could have been raised as to whether the jurisdiction conferred by the Convention was subject to state immunity....*⁴⁹

Secondly, although some relevant international legal instruments are intended to confer universal jurisdiction and abolish immunity over the international crimes they prohibit, some of them contain provisions which undermine the universal jurisdiction mission and render the anti-immunity efforts of the mechanism less effective. For instance, under article 4 of the *UN Convention on the Prevention and Punishment of the Crime of Genocide*⁵⁰ (“*Genocide Convention*”), “Persons committing genocide ... shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”. However, article 6 provides that “Persons charged with genocide ... shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.” By article 6, the *Genocide Convention* fails to even vest universal jurisdiction in the courts of all states parties to the Convention. It vests jurisdiction over the crime only in the territorial state.

The foregoing means that where the alleged offenders are in control of political power in the state in which the genocide was committed, they can manipulate the state’s judicial system

⁴⁸ Emphasis supplied.

⁴⁹ Emphasis supplied.

⁵⁰ 1948, 78 UNTS 277.

against their prosecution. Again, where such an international penal tribunal envisaged by the *Convention* (e.g., the current ICC) is established, a state party to the *Genocide Convention* in whose territory genocide was committed, or whose officials committed it, may not accept the Court's jurisdiction.⁵¹ In these two scenarios, the culprits could go scot-free. In the first scenario, there is no obligation to "prosecute or extradite" to another state for prosecution under the *Genocide Convention*, and there is no will to prosecute domestically. In the second scenario, the state involved may not be bound by the enabling statute of the penal tribunal. Thus, the immunity and impunity of the culpable officials will continue to thrive. It may be argued that there is now universal jurisdiction over genocide under customary international law.⁵² This would compensate for this serious weakness in the *Genocide Convention*. However, this may not be sufficient compensation, given the general political unwillingness of states to employ the universal criminal jurisdiction mechanism, even in the face of clear treaty obligations to do so.⁵³

The factors of lack of express provisions on disregard of state immunity and conferment of universal jurisdiction, and self-contradictory provisions, all of which are discussed in the preceding paragraphs, played out in *Re Sharon & Yaron*⁵⁴. In this case, the Belgian Cour de Cassation held that article 6 of the *Genocide Convention* denied Belgian courts universal

⁵¹ See, e.g., the *Rome Statute of the International Criminal Court*, 1998, UN Doc A/CONF 183/9 (1998), 2187 UNTS 90, art 12. See also Zhu, Wenqi & Binxin Zhang, "Expectation of Prosecuting the Crimes of Genocide in China", in Provost, Rene & Payam Akhavan, *Confronting Genocide* (Montreal, Quebec, Canada: Springer, 2011) 173 at 181; Hassan, Saud, "Establishment of the International Criminal Court and the Role of USA: A Legal Appraisal" (2010) 1 Northwestern University JL 51 at 51; Human Rights Watch, "The ICC Jurisdictional Regime: Addressing U.S. Arguments", in Driscoll, William et al (eds), *The International Criminal Court: Global Politics and the Quest for Justice* (New York: The International Debate Education Association, 2004) 182 at 184; Gates, David, "The International Criminal Court in Relation to Non-party States", *The Singapore Law Gazette*, March 2009, online: < <http://www.lawgazette.com.sg/2009-1/feature2.htm>>.

⁵² See, e.g., Boister, Neil and Richard Burchill, "The Implication of the Pinochet Decisions for the Extradition or Prosecution of Former South African Heads of State for Crimes Committed under Apartheid" (1999) 11 AJICL (Pt 4) 619 at 627; Karnavas, Michael, "Is the Emerging Jurisprudence on Complicity in Genocide before the International Ad Hoc Tribunals a Moving Target in Conflict with the Principle of Legality?", in Henham, Ralph & Paul Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Aldershot, England: Ashgate Publishing, 2007) 97 at 101.

⁵³ This point is examined subsequently.

⁵⁴ (2003) 42 ILM 596 (Judgment of 12 February 2003).

jurisdiction over the first accused person's alleged international crimes. A number of survivors of the 1982 massacre in Sabra and Shatila Palestinian refugee camps (Lebanon) had lodged a criminal complaint against Ariel Sharon (Israeli Defence Minister at the time of the massacre and Prime Minister at the time of the complaint) and Amos Yaron (commander of an Israeli army unit at the gates of the refugee camps), accusing them of genocide, crimes against humanity and war crimes. In denying jurisdiction and dismissing the case against Sharon, the Cour de Cassation held thus:

International custom does not allow heads of state or government to be prosecuted before criminal courts of a foreign state, absent international rules binding upon the states concerned. Certainly, Article IV of the Convention on Genocide provides that persons who have committed ... genocide shall be punished without taking into account their official status. Nevertheless, Article VI ... only envisages prosecution ... before a competent tribunal of the state in the territory of which the act was committed or before the International Criminal Court. It follows ... that immunity ... is excluded before the courts referred to in Article VI, but it is not ... before a court of a third state that intends to exercise jurisdiction not provided for in the treaty.... The 1949 Geneva Conventions and the Additional Protocols ... do not contain any provision impeding the immunity ... of which the defendant may [avail] himself before Belgian courts....⁵⁵

Thirdly, due to political, economic and allied considerations, the courts of many states have not been willing to apply the universal jurisdiction mechanism in order to try and punish high-ranking officials of foreign states.⁵⁶ Typical examples are the numerous criminal cases commenced in the courts of Germany, France, Argentina, Sweden, and Spain, against Donald Rumsfeld (former US Defence Secretary), George Walker Bush (former US President) and other

⁵⁵ Cassese, Antonio et al, *International Criminal Law: Cases and Commentary* (Oxford: Oxford University Press, 2011) at 92.

⁵⁶ See, e.g., Inazumi, Mitsue, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Utrecht, The Netherlands: Intersentia, 2005) at 116; Wilke, Christiane, "A Particular Universality: Universal Jurisdiction for Crimes Against Humanity in Domestic Courts" (2005) 12:1 Constellations 83 at 83-84.

high-ranking US officials.⁵⁷ The charges indicted them for their roles in the torture of detainees in the US' detention facility in Guantanamo Bay in Cuba, Abu Ghraib Jail in Iraq, Afghanistan and in secret "black sites"⁵⁸ operated by the US around the globe.⁵⁹ The US had failed to prosecute these officials and so the charges were commenced pursuant to these other states' universal jurisdiction laws. Many of the charges have, however, been dismissed in response to political and allied pressure from the US, while others were dismissed on grounds of state immunity.⁶⁰

In practice, this mechanism is rarely invoked against high-ranking state officials. It is almost exclusively employed to try and punish ordinary individuals and state officials of lower rank.⁶¹ This habit is not unconnected to the desire of states to maintain reciprocal friendly relations with each other.⁶² The result is that state immunity, together with its problems, continues to operate in the international criminal justice system, despite the existence of the universal criminal jurisdiction mechanism. The consequence of this situation for the world was captured by Guerreiro who commented:

Despite the acceleration in legislative activity that followed the creation of the Tribunals at Nuremberg and Tokyo, *realpolitik* still loomed large over the protection of Human Rights, in such a manner that the world

⁵⁷ See Center for Constitutional Rights, "Universal Jurisdiction: Accountability for U.S. Torture", online: <<http://www.ccrjustice.org/case-against-rumsfeld>>; Center for Constitutional Rights, "French War Crimes Complaint Against Donald Rumsfeld, et al", online: <<http://www.ccrjustice.org/case-against-rumsfeld>>.

⁵⁸ "Black sites" in the present context denote secret prisons operated by the US' Central Intelligence Agency (CIA) generally outside of US territory and legal jurisdiction. See Cook, John, "This is What a CIA Black Site Looks Like", online: <<http://gawker.com/5866267/this-is-what-a-cia-black-site-looks-like>>.

⁵⁹ See Center for Constitutional Rights, "Universal Jurisdiction: Accountability for U.S. Torture", op cit, note 57.

⁶⁰ Ibid. See also Chelala, Cesar, "The Case for Donald Rumsfeld's Prosecution", Common Dreams, April 6, 2014, online: <<http://www.commondreams.org/view/2014/04/06-5>>; Sikkink, Kathryn, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: WW Norton & Co, 2011) at 218-222; European Center for Constitutional and Human Rights, "Rumsfeld Torture Cases", online: <<http://www.ecchr.de/index.php/rumsfeld.html>>.

⁶¹ See Prevent Genocide International, "Genocide and International Crimes in Domestic Courts", online: <<http://www.preventgenocide.org/punish/domestic/>>; Cassese, Antonio, "When May Senior State Officials be Tried for International Crimes?: Some Comments on the Congo v. Belgium Case" (2002) 13:4 EJIL 853 at 870-871.

⁶² See, e.g., Langer, Maximo, "The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes", op cit, note 44 at 1.

witnessed, for the first three decades of the Cold War, individuals acting blatantly against mankind without being punished. Among the most serious cases, the military interventions in Vietnam and the Gulf and violations of Human Rights in Cuba, Chile, Argentina and South Africa stand out.⁶³

The observations of the International Council on Human Rights Policy (“ICHRP”) express the impact of this troubling scenario on the international criminal judicial process itself. According to the Council:

Prosecutions of current leaders should ideally be given a high priority because they may actually stop abuses However, the prosecution of serving heads of state is both legally and politically very difficult...., some of the opinions in the House of Lords decision in the Pinochet case include very troubling language concerning the absolute immunity of a current head of state. Piercing the veil of immunity will undoubtedly be all the more difficult in a case involving a sitting head of state. Indeed, the Pinochet case illustrates how great a challenge immunity can pose even in the case of a leader who has long been out of power. States are likely to be all the more reluctant to prosecute (or extradite) a current leader based on the possible foreign policy consequences of such action.... If it seems that prosecutions are only proceeding against the small fish, then over time the sense of unfairness, that big fish are let off the hook, will call into question the credibility of the process....⁶⁴

In essence, state practice makes the universal jurisdiction mechanism an instrument of social dichotomy and selective justice. It is a tool used against ordinary individuals and state officials of low rank, while high-ranking state officials who order or commit the most heinous international crimes are often shielded from its operation. Realpolitik has thus converted this laudable mechanism into an instrument of injustice, thereby defeating its anti-state-immunity potential.

⁶³ Guerreiro, Alexandre, “*From Breisach to Rome: International Court’s Long Road*” (2013) 2:24 UERJ-RFD 24 at 32. See also Chevigny, Paul, “*The Limitations of Universal Jurisdiction*”, Global Policy Forum, March 2006, online: < <http://www.globalpolicy.org/component/content/article/97/32133.html>>; Ireland-Piper, Danielle, “*Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine*” (2013) 9:4 Utrecht L Rev 68 at 72.

⁶⁴ International Council on Human Rights Policy, *Hard Cases: Bringing Human Rights Violators to Justice Abroad: A Guide to Universal Jurisdiction* (Versoix, Switzerland: International Council on Human Rights Policy, 1999) at 21-22.

Fourthly, there is lack of uniformity among states as regards national legislative implementation of the universal criminal jurisdiction principle. As it is an international law principle, universal jurisdiction relies on national laws and instruments for its implementation. However, state legislative practices in this regard are inadequate and inconsistent.⁶⁵ Some states have enacted statutes with universal jurisdiction, while others have not. Even among states that have enacted such statutes, the scope of exercise of the jurisdiction differs. Some core international crimes are included in the statutes of some states, while other core crimes are not covered.⁶⁶ Length of punishment may also differ. Furthermore, although some states have domesticated the international legal instruments prohibiting some international crimes, some of the domesticating instruments fail to expressly provide for universal jurisdiction. On this, Dalila Hoover observes that though most states accept that it is morally right to exercise universal jurisdiction over international crimes, some of these states, citing the examples of China, Denmark and Norway, fail to enact appropriate comprehensive legislation for the purpose.⁶⁷ Their failure arises from politics, national legal incapacity to implement the laws, and failure to include the concept of international crimes in their criminal laws.⁶⁸

The sum effect of these inconsistencies is a fragmented situation where the national courts of some states hold foreign high-ranking state officials accountable for international

⁶⁵ Amnesty International, “*Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*”, AI Index: IOR 53/2002-018/2001, online: <<http://www.amnesty.org/en/library/asset/IO53/020/2001/en/009a145b-d8b9-11dd-ad8c-f3d4445c118e/ior530202001en.pdf>>.

⁶⁶ See Yang, Lijun, “*On the Principle of Complementarity in the Rome Statute of the International Criminal Court*” (2005) 4 Chinese J Int’l L 121 at 128.

⁶⁷ Hoover, Dalila V, “*Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court*” (2011) Cornell Law School Inter-University Graduate Student Conference Papers, Paper 52 at 8-9, also online: <http://www.scholarship.law.cornell.edu/lps_clap/52>.

⁶⁸ Ibid at 9-10. See also Kochler, Hans, “*Universal Jurisdiction and International Power Politics: Ideal versus Real*” (2006) Yeditepe ‘de Felsfe 1 at 3, also online; <http://hanskoechler.com/koechler-universal_jurisdiction-2006.pdf>; Abelson, Adam, “*The Prosecute/Extradite Dilemma: Concurrent Criminal Jurisdiction and Global Governance*” (2009) 16:1 University of California, Davis J Int’l L & Policy 1 at 15.

crimes pursuant to the universal criminal jurisdiction mechanism, while the courts of other states do not.

A fifth challenging factor in the use of the universal criminal jurisdiction mechanism in the fight against state immunity and its problems is found in the negative attitudes of some states. Some states remain adamantly committed to the practice of absolute state immunity (mostly a civil issue but with some criminal repercussions), subjection of international crimes to domestic limitation statutes, and refusal to conclude or implement relevant extradition treaties. Once any of these commitments holds sway, universal jurisdiction ceases to be efficacious. Under Chinese law, for example, government officials or persons with official capacity are still granted absolute immunity from criminal prosecution (including for heinous international crimes).⁶⁹ China's negative approach is also followed by some other states.⁷⁰

Under the *UN Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*⁷¹ (“UN Statutory Non-Limitations Convention”) international criminal prosecutions for war crimes and crimes against humanity are not affected by any limitation statute and, therefore, cannot be time-barred. However, some states observe this rule more in the breach than in compliance. Danish national law, for instance, subjects prosecution for international crimes to a ten-year limitation period.⁷² Under the French law, war crimes are subject to statutory limitation, increased from ten to thirty years in 2010.⁷³ The

⁶⁹ Hoover, Dalila V, op cit, note 67 at 17. See also Yang, Lijun, op cit, note 66 at 130.

⁷⁰ These other states include Russia and Romania. See, e.g., Verdier, Pierre-Hugues & Erik Voeten, “*How Does Customary International Law Change? The Case of State Immunity*”, online: <[http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/lectures/Verdier_State_Immunity_Paper_\(DraftCambridge\).pdf](http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/lectures/Verdier_State_Immunity_Paper_(DraftCambridge).pdf)> at 14-16.

⁷¹ 1968, UN Doc A/7218, art 1. Interestingly, the *Convention* includes genocide as part of crimes against humanity.

⁷² See the *Danish Penal Code*, online: <http://web.archive.org/web/20110719131559/http://www.pet.dk/English/Operational_tasks/Legal_basis/Penal_code.aspx>, ss 93-97. See also Hoover, op cit, note 67 at 12.

⁷³ *Loi n° 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'instruction de la Cour pénale internationale*, online: <<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022681235&dateTexte=&oldAction=rechJO&categorieLien=id>>; See also Ambos, Kai, *Treatise on International Criminal Law, Vol 1: Foundations and General Part* (Oxford: Oxford University Press, 2013) at 427-431.

existence of this limitation incapacitates the use of universal jurisdiction to combat immunity and the impunity of foreign high-ranking state officials before various national courts.

Where there is no extradition treaty between two states or where the states refuse to respect such a treaty, attempts by one state to exercise universal criminal jurisdiction over high-ranking state officials within the other state's territory will not succeed, although this may not affect the possibility of prosecution in other states. Dalila Hoover speaks of this situation as follows:

... although the right to extradite for crimes exists under international law, many States fail to have extradition laws. The Pinochet case for instance, made clear the extent to which national laws regarding extradition can create obstacles and delay the exercise of universal jurisdiction. In another instance, following the amendment of its 1993 law, Belgium retained pending cases including that of former President of Chad, Hissène Habré. Belgium sought his extradition from Senegal where he was arrested. However, the Senegalese court did not grant Belgium's request for extradition. Instead, the court referred the matter to the African Union which decided that the matter fell within its competence and ultimately mandated Senegal to prosecute Hissène Habré. These two instances illustrate how proceedings to extradite are made more difficult and are often left to the discretion of political rather than judicial authorities.⁷⁴

Sixth, it is only immunity *ratione materiae* (functional immunity) of foreign state officials that can be removed before national courts in appropriate cases pursuant to the universal criminal jurisdiction mechanism. This is affirmed in the dissenting opinion of Lord Phillips in the *Pinochet* case⁷⁵. On the other hand, immunity *ratione personae* (personal immunity) remains absolute and sacrosanct before a foreign court and cannot be removed or disregarded for as long as the culpable official remains in office. In the words of Michael Tunks, "... no nation has yet

⁷⁴ Hoover, op cit, note 67 at 18.

⁷⁵ Supra, note 47 at 289, paras E-H. See also O'Keefe, Roger, "Jurisdictional Immunities", in Tams, Christian J & Joseph Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013) 107 at 127-131; Cassese, Antonio et al, *International Criminal Law; Cases and Commentary* (Oxford: Oxford University Press, 2011) at 81; Akande, Dapo & Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (2010) 21:4 EJIL 815 at 841-843.

gone so far as to actually pass judgment against a sitting head of state.”⁷⁶ This is why the international criminal charges and/or prosecutions commenced against sitting heads of state, heads of government, and foreign ministers, in the following cases were declared inadmissible and dismissed on grounds of immunity *ratione personae* of the accused persons: *Re Mugabe*⁷⁷, *Re Sharon & Yaron*⁷⁸, *Re Castro*⁷⁹, *Re Kagame*⁸⁰, the *Case Concerning the Arrest Warrant of 11 April, 2000 (Democratic Republic of Congo v Belgium)*⁸¹ (“ICJ Arrest Warrant Case”), and *Re Gaddafi*⁸².

It appears that the only known case where the immunity *ratione personae* of a sitting high-ranking state official (a head of state) has been denied in criminal proceedings before a foreign court is the case of *US v Noriega*⁸³. However, the denial of immunity in this case was justified on the ground that the US government had never given any recognition to General Manuel Noriega as the head of state of Panama. The US merely considered him as the *de facto* ruler of Panama to whom the protection of state immunity did not accrue. The correctness or otherwise of the court’s reasoning in this case with regard to the effect of non-recognition on the immunity of an incumbent ruler of a sovereign state is beyond the scope of this thesis. However, the danger illustrated in subjecting to a foreign court the issue of whether Noriega was a *de facto* ruler or a *de jure* head of state may fall within the scope of the thesis. The US court’s ruling on

⁷⁶ Totten Christopher D, “Head-of-State and Foreign Official Immunity in the United States After Samanta: A Suggested Approach” (2011) 34:2 Fordham ILJ 332 at 332; Koh, Harold Hongju, “Foreign official Immunity after Samantar: A United States Government Perspective” (2011) 44:5 Vanderbilt JTL 1141 at 1153-1154;

Tunks, Michael A, “Diplomats or Defendants? Defining the Future of Head-of-State Immunity” (2002) 52:3 Duke LJ 651 at 663.

⁷⁷ Reported in Warbrick, Collin, “Public International Law: I. Immunity and International Crimes in English Law” (2004) 53:3 ICLQ 769.

⁷⁸ (2003) 42 ILM 596 (Judgment of 12 February 2003).

⁷⁹ Cited in Harrington, Joanna et al (eds), *Bringing Power to Justice? The Prospects of the International Criminal Court* (Montreal, Canada: McGill-Queen’s University Press, 2006) at 79.

⁸⁰ Auto del Juzgado Central Instruccion No. 4 (Spain, Audiencia Nacional 2008).

⁸¹ (2002) ICJ Reps 3.

⁸² Arrêt no. 1414, (2001) 125 ILR 456.

⁸³ 117 F.3d 1206 (11th Cir., 1997).

this point was transparently bogus. The Noriega case illustrates well the other side of the argument: use of national courts that presents problems of politics and abuse.

The seventh area of concern about this mechanism is its potential to lead to neo-colonialism due to the fact that it is inherently open to abuse and national manipulation. There is reasonable fear on the part of less developed states that a vigorous campaign of universal jurisdiction would allow developed states to exercise undue political influence and manipulation over the leadership of the less developed ones. This would lead to “jurisdictional imperialism” (a form of colonialism), and worsen the current North-South divide in international relations and politics.⁸⁴ The ICHRP frames this concern thus:

The term “jurisdictional imperialism” might be used to describe the concern that most universal jurisdiction prosecutions are likely to take place in North American and European courts, whereas the majority of those prosecuted are likely to come from developing countries. This is a real concern given that in recent years – though not before – many of the gravest human rights crimes have occurred in developing countries. It is also clear that western states are more likely to have the resources and legal structures in place to support universal jurisdiction prosecutions. This imbalance could discredit a legal process that claims to be truly international. Were former colonial powers to take a sudden interest in crimes committed in their former colonies, though their own colonial record has been exempt from scrutiny, it might appear to be unfair or an abuse of power. There is no easy answer to this problem....⁸⁵

Recently, Rwanda advanced this argument in protest against the exercise of universal jurisdiction by France and Spain, when judges from both states issued warrants of arrest against some high-ranking Rwandan officials.⁸⁶ Rwanda described itself as a victim of abuse by the universal jurisdiction asserted by French and Spanish judges. On similar grounds, the AU has

⁸⁴ See, e.g., International Council on Human Rights Policy, *Hard Cases: Bringing Human Rights Violators to Justice Abroad: A Guide to Universal Jurisdiction* (Versoix, Switzerland: International Council on Human Rights Policy, 1999) at 20-21; Zemach, Ariel, “*Reconciling Universal Jurisdiction with Equality before the Law*” (2011) 47:NNN Texas ILJ 1 at 29-30.

⁸⁵ International Council on Human Rights Policy, op cit, note 84.

⁸⁶ See Rwanda, “*Report on Information and Observations on the Scope and Application of the Principle of Universal Jurisdiction*”, online: <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Rwanda.pdf> at 2.

also resisted the exercise of universal jurisdiction on nationals of AU member states by national courts of non-AU member states.⁸⁷ In fact, universal jurisdiction and the ICC are seen as “... the new weapons of choice of former colonial powers targeting weaker African nations.”⁸⁸ Paul Kagame (current Rwandan President) questions the justice of resort to this mechanism in the following terms:

... lately, some in the more powerful parts of the world have given themselves the right to extend their national jurisdiction to indict weaker nations. This is total disregard of international justice and order. Where does this right come from? Would the reverse apply such that a judgment from less powerful nations indicts those from the more powerful?⁸⁹

This situation reveals that national courts may sometimes not be trusted when it comes to fair trial of high-ranking officials of other states. The foregoing analysis, therefore, shows that contrary to expectations, the universal criminal jurisdiction mechanism, as it is currently practised, is not effective enough to respond to the numerous problems arising from the application of the state immunity rule in the international criminal justice system. On this note, the weaknesses of the next response mechanism – the hybrid criminal tribunal mechanism – are examined.

⁸⁷ See, e.g., African Union (AU) Assembly, Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, A.U. Doc. Assembly/AU/Dec.199(XI) (July 2008). See also Coombes, Karinne, “*Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations*” (2011) 43:3 Geo Wash Int’l L Rev 419 at 422; Arimatsu, Louise, “*Universal Jurisdiction for International Crimes: Africa’s Hope for Justice?*”, Chatham House Briefing Paper, International Law, April 2010, IL/BP/2010/01 at 18; Van Der Wilt, Harmen, “*Universal Jurisdiction under Attack: An Assessment of the African Misgivings of International Criminal Justice, as Administered by Western States*”, online: <<https://web.up.ac.za/sitefiles/file/47/15338/Universal%20Jurisdiction%20under%20attack%20vd%20Wilt.pdf>>.

⁸⁸ Jalloh, Charles Chernor, “*Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction*” (2010) 21 CRIM LF 1 at 3–4. See also Du Plessis, Max, “*The International Criminal Court and Its Work in Africa: Confronting the Myths*”, ISS Paper 173, November 2008 at 2.

⁸⁹ Kagame, Paul, “*Presidents Discussing Tomorrow*”, an address delivered at the “*Facing Tomorrow*” Conference, Jerusalem, Israel, 13 May 2008, online: <<http://www.presidency.gov.rw/speeches/156-13th-may-2008>>.

5.4 Weaknesses of the Hybrid Criminal Tribunal Mechanism

The emergence of the hybrid criminal tribunal mechanism in the international criminal justice system has certainly contributed in no small measure to curbing some of the problems of state immunity. This is seen in the good number of high-ranking state officials that have been stripped of their immunity, tried and punished by the relevant hybrid (internationalized) criminal tribunals examined in Chapter 4.⁹⁰ Their contribution is summed up thus⁹¹:

All the ... judicial institutions [hybrid tribunals] ... have vigorously emphasized the irrelevance of customary immunities and have prosecuted many individuals regardless of their official position, thereby further confirming that heinous and illegal actions under international law could no longer be defended under immunity. Today, international crimes could never be official functions and the official position of any accused person, whether as Head of State or Government or as a responsible government official, shall not relieve such person from criminal responsibility nor mitigate punishment.

Notwithstanding its usefulness in the fight against state immunity and official impunity, the mechanism exhibits shortcomings that undermine its effectiveness. Some of these shortcomings, associated with some of the tribunals under this mechanism, are the same as those of the *ad hoc* international criminal tribunal mechanism earlier discussed in this Chapter⁹² and, therefore, need no further detailed examination. They include: geographical and temporal jurisdictional limitations, implementation of *ex post facto* laws, and undue influence from the

⁹⁰ See also, e.g., Fox, Hazel, “*International Law and Restraints on the Exercise of Jurisdiction by National Courts of States*”, in Evans, Malcolm D (ed), *International Law*, 4th ed (Oxford: Oxford University Press, 2014) 336 at 345-346; Sriram, Chandra Lekha, “*Wrong-Sizing International Justice?: The Hybrid Tribunal in Sierra Leone*” (2005) 29:3 Fordham ILJ 472 at 486-488.

⁹¹ Abegunde, Babalola, “*Irrelevance of Immunity for International Crimes Particularly Crimes under International Humanitarian Law*” (2007) 4:2 JLD 1 at 2. See also Waduge, Shenali, “*The Push for a Sierra Leone Type Tribunal Against Sri Lanka – OPED*”, Eurasia Review, March 27 2014, online: < <http://www.eurasiareview.com/27032014-the-push-for-a-sierra-leone-type-tribunal-against-sri-lanka-oped/>>; Costi, Alberto, “*Hybrid Tribunals as a valid Alternative to International Tribunals for the Prosecution of International Crimes*”, Human Rights Research, online: <<http://www.victoria.ac.nz/law/centres/nzcpl/publications/human-rights-research-journal/publications/vol-3/Costi.pdf>>; Frulli, Micaela, “*Head of State Immunity: Lessons from the Taylor Trial*”, Academia.edu, online: < http://www.academia.edu/6185800/Head_of_State_Immunity_Lessons_from_the_Taylor_Trial>; Serra, Gianluca, “*Special Tribunal for Lebanon: A Commentary on Its Major Legal Aspects*”, Jura Gentium, online: < <http://www.juragentium.org/topics/wlgo/en/serra.htm>>.

⁹² See Sub-heading 5.2 above.

world powers in their creation and administration, which impairs the tribunals' impartiality and of independence. Some of the tribunals also administer victor's justice. This is specifically alleged against the IST. While alluding to this situation about this tribunal, Robert Cryer stated:

The legitimacy of the Tribunal is ... considered by some to be compromised by the relationship between the Iraqi Governing Coalition and the US/UK 'Authority' in Iraq.... the ghost of victor's justice has been raised again, as although Ba'ath crimes are to be prosecuted, the jurisdiction of the Special Tribunal is structured so that it is impossible to try any international crimes committed by the occupying powers."⁹³

Again, the creation of some of them is dictated by the political whims and caprices of the international community. Thus, some of the tribunals have been created where the international community is favourably disposed to doing so, while other deserving situations have been ignored. An example of such ignored situations relates to the repeated calls to establish a Sierra Leone (SCSL) type tribunal in Sri Lanka to try the numerous international crimes allegedly committed during the recently concluded Sri Lankan civil war.⁹⁴

The hybrid criminal tribunal mechanism also manifests some peculiar weaknesses. For instance, most hybrid tribunals are institutionalized within the domestic court systems of the states concerned ("host states"). These host states mostly provide the infrastructural and other facilities needed for their functioning. Again, many of their judges are appointed and paid by the host states. Because of these factors, there is sometimes undue interference from the host states

⁹³ Cryer, Robert, *Prosecuting International Crimes: Selectivity in the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005) at 71-72; Alvarez, Jose E, "Trying Hussein: Between Hubris and Hegemony" (2004) 2:2 JICJ 319 at 326-327; La Haye, Eve, *War Crimes in Internal Armed Conflicts* (Cambridge: Cambridge University Press, 2008) at 266.

⁹⁴ See, e.g., Waduge, Shenali D, "The Push for a Sierra Leone Type Tribunal against Sri Lanka", SinhalaNet, March 27 2014, online: <<http://www.sinhalanet.net/the-push-for-a-sierra-leone-type-tribunal-against-sri-lanka>>; De Silva, Dandu, "Will Sri Lanka End up in a Sierra Leone Type Situation? Darussaman Panelists Feed the Conspiracy Theory", Lankaweb, March 6 2014, online: <<http://www.lankaweb.com/news/items/2014/03/06/will-sri-lanka-end-up-in-a-sierra-leone-type-situation-darussaman-panelists-feed-the-conspiracy-theory/>>.

in the smooth operation of some of the tribunals.⁹⁵ In some cases, the decision as to which high-ranking state official to proceed against is influenced by the host state, since “he who pays the piper calls the tune”. Indeed, some heads of state and/or government of the host states have turned the tribunals into instruments of intimidation and suppression of political opponents. This situation impairs the independence and impartiality of the tribunals and their capacity to contend against state immunity and impunity in the international criminal justice system. The ECCC typifies this situation as follows⁹⁶:

Despite the fact that the ECCC was established with the intention ... to try international crimes in accordance with international standards, the result ... was the opposite; ... the ECCC was infected by the shortcomings of the Cambodian system. The Cambodian Government controls the proceedings and nothing happens in the trial without its ... consent. The international side of the ECCC is held hostage by the Cambodian Government.

In addition⁹⁷:

The influence of the Cambodian Government is very clear in cases ... which involve current generals in the Cambodian army. Obviously, investigating the allegations against these generals would embarrass the Cambodian Government. To avoid such embarrassment, the government constantly interferes with the proceedings to the point that the investigating judge was forced to resign In the Nuon Chea case, the government’s interference is more subtle but nevertheless exists. Every time issues are raised relating to the government’s interference the microphones are turned off and the broadcast of the trial breaks. In addition, the structure of the court, with a majority of Cambodian judges proved to be disadvantageous to the defence; none of the defence requests

⁹⁵ Allegations of such interference have been leveled against the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) and the Iraqi Special Tribunal/Iraqi Higher Criminal Court. See, e.g., Global Policy Forum, “*The Iraq Tribunal*”, online: <<https://www.globalpolicy.org/component/content/article/163/28693.html>>; Bright Knowledge, “*Famous Cases: The Trial of Saddam Hussein*”, online: <<http://www.brightknowledge.org/knowledge-bank/law-and-politics/features-and-resources/famous-cases-the-trial-of-saddam-hussein>>; International Center for Transnational Justice, “*Creation and First Trials of the Supreme Iraqi Criminal Tribunal*”, ICTJ Briefing Paper, October 2005, at 11, online: <http://www-tc.pbs.org/weta/crossroads/incl/trial_Tribunal.pdf>; Ringer, Brandy, “*Political Interference and Judicial Misconduct Impede Justice in Cambodia*”, *The Jurist*, 6 December 2011, online: <<http://jurist.org/hotline/2011/12/nisha-valabhji-cambodian-interference.php>>.

⁹⁶ Pestman, Michiel et al, “*Milestones in International Criminal Justice: Mixed Tribunals and Developed International Justice – Beyond the ICC*”, Chatham House: International Law Meeting Summary, 16 October 2012 at 4, also online: <<http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/161012summary.pdf>>.

⁹⁷ Ibid at 4-5.

during proceedings was ever accepted. The defence case cannot be presented effectively, through witnesses and documents: new documents cannot be used during cross-examination of witnesses, questions cannot be raised during court hearings and everything must be done in writing. As it normally takes a few months to receive the Court's reply, this is another effective way to silence the defence. ... it is clear that the proceedings are a farce. Prime Minister Hun Sen has publicly stated that Nuon Chea committed genocide and that he should be convicted. In the Cambodian context this is a very clear instruction to everyone, including the judges. This should not be the example that the international community sets for proceedings according to international standards. ...

The next mechanism whose weaknesses are examined is the Permanent International Criminal Court mechanism.

5.5 Weaknesses of the Permanent International Criminal Court Mechanism⁹⁸

The legal regime of the International Criminal Court Mechanism – the *Rome Statute*⁹⁹ - is carefully designed to overcome the numerous weaknesses of the *ad hoc* international criminal tribunal mechanism, the universal criminal jurisdiction mechanism, and the hybrid criminal tribunal mechanism. In principle, at least, it disarms some of the criticisms of earlier attempts at responding to the problems of the state immunity rule. The International Criminal Court mechanism ("ICC mechanism") is intended to be a global mechanism.¹⁰⁰ This is seen, *inter alia*, in the high number of ratifications the *Rome Statute* has received so far.¹⁰¹ Thus, in principle, it is subject to no geographical jurisdictional limitation (though *article 12* of the *Rome Statute* limits its jurisdiction to the territories or nationals of party states, which is currently a practical

⁹⁸ This part of this thesis partly draws from a previous research paper written and submitted by the present writer to the Schulich School of Law, Dalhousie University, Halifax, Nova Scotia, Canada in April, 2014. The research paper is titled: "*The International Criminal Court System: An Impartial or a Selective Justice Regime?*".

⁹⁹ *Rome Statute of the International Criminal Court*, *supra*, note 51.

¹⁰⁰ *Ibid*, preamble, paras 1-8. See also Coalition for the International Criminal Court, "*A Universal Court with Global Support*", online: < <http://www.iccnw.org/?mod=universalcourt>>; Arbour, Louise, "*The International Criminal Court*", Hunt for Justice, online: < <http://huntforjustice.com/4-icc-en.php>>.

¹⁰¹ So far, 122 states have ratified the Rome Statute. See United Nations, "*Treaty Collection*", online: <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en>.

limitation). Unlike the ad hoc and hybrid criminal tribunal mechanisms, it was not created by, or at the behest of the World Powers, but by a conference of sovereign states, big and small, who willingly participated in the process.¹⁰² To avoid the problem of limited temporal jurisdiction (as regards future commission of international crimes), the ICC mechanism is a permanent justice mechanism with no completion period.¹⁰³

Furthermore, the problem of *ex post facto* exercise of temporal jurisdiction is solved under this mechanism by the fact that the ICC's temporal jurisdiction commences from the date of entry into force of its enabling instrument.¹⁰⁴ The ICC has no jurisdiction over crimes committed before this date. The ICC is also not set up to administer victor's justice; it is not a post-war justice institution created by the victorious party to punish the vanquished. It is created as a mechanism to administer uniform, equal, universal, independent, and impartial justice, devoid of political and allied manipulations.¹⁰⁵ Ideally, it is the most suitable mechanism for responding to the problems of the state immunity rule in the international criminal justice system.

Although the ICC mechanism appears an attractive tool to use against the state immunity rule and its problems, it also has some shortcomings that adversely affect its effectiveness. These shortcomings range from selective justice to undue external influence, preservation of bilateral immunity agreements between states, limited jurisdictional bases, and jurisdictional politics over certain crimes. The shortcomings are examined below.

¹⁰² The UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

¹⁰³ *Rome Statute*, supra, note 51, art 1.

¹⁰⁴ *Ibid*, art 11(1).

¹⁰⁵ *Ibid*, preamble.

5.5.1 Selective Justice

Currently, the ICC mechanism manifests some forms of selective justice. This selective justice is displayed along geographic, nationality and thematic lines.

As already shown, the ICC is a court with a global mandate. Besides, in international law, all states are equal in sovereignty.¹⁰⁶ Thus, the high-ranking officials of all states should be equal before the ICC mechanism, without discrimination. Consequently, the mechanism's attempt at disregarding/abolishing state immunity should not focus exclusively on the officials of some states, while exempting those of other states. Article 27(1) of the *Statute* reinforces this position thus: "The Statute shall apply equally to all persons without any discrimination ..."

In practice, however, the mechanism has been highly selective of the nationalities and regional identities of the state officials on whom its anti-state-immunity regime focuses. Despite the high number of ratifications the *Rome Statute* has received from states in all geographic regions (continents), the Court's efforts against state immunity are exclusively focused on officials of African states.¹⁰⁷

There are three ways (trigger mechanisms) by which a situation may be referred to the ICC: voluntary referral by a state party, referral by the UN Security Council (UNSC) of a situation in a state that is not a party to the *Rome Statute*, and the ICC Prosecutor acting *proprio motu*.¹⁰⁸ Generally, situations referred to the ICC go through three phases: preliminary examination, formal investigation, and substantive cases (including indictments, arrest warrants/summonses to appear, and trial). After exhausting all the three trigger mechanisms,

¹⁰⁶ *Charter of the United Nations*, 1945, 1 UNTS XVI ("UN Charter"), art 2(1).

¹⁰⁷ See Phooko, Moses Retselisitsoe, "How Effective the International Criminal Court Has Been: Evaluating the Work and Progress of the International Criminal Court" (2011) NDJICHL 182 at 194; Gegout, Catherine, "The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace" (2013) 34:5 TWQ 800 at 808; Du Plessis, Max, "Universalizing International Criminal Law: The ICC, Africa and the Problem of Political Perceptions" (2013) 249 ISS Paper 1 at 1.

¹⁰⁸ *Rome Statute*, supra, note 51, arts 13-15.

some high-ranking state officials (including sitting heads of state) have been subjected to the substantive case phase. Thus, some have been indicted, others have been arrested and are currently undergoing trials, while arrest warrants/summons to appear before the Court to answer charges have been issued against yet others.¹⁰⁹ Some of the situations involving these and some other state officials are also undergoing formal investigations.¹¹⁰

However, it is worthy of note that these high-ranking officials who have been denied immunity and subjected to investigations, indictments, arrests, and trials are all officials of African states.¹¹¹ The situations giving rise to the cases against them arose from the use of all the three referral (trigger) mechanisms stated above.¹¹² Most of the situations subject to preliminary examinations are also situations in African states¹¹³, and the state officials to be eventually investigated and indicted in these situations will also be African state officials. These facts give rise to the appearance that the officials of these African states have become sacrificial “scapegoats” within the working of the ICC mechanism, while their counterparts in other regions are untouchable “sacred cows”. This selective justice practice undermines the mechanism’s anti-state-immunity regime. It also undermines the concept of sovereign equality in international law

¹⁰⁹ See International Criminal Court, “*All Cases*”, online: <http://www.icc-cpi.int/en_menus/icc/situationsandcases/cases/pages/casesindex.aspx>.

¹¹⁰ Coalition for the International Criminal Court, “*Cases and Situations*”, online: <<http://www.iccnw.org/?mod=casesituations>>.

¹¹¹ These include Omar Al Bashir (sitting President of Sudan), Muammar Gaddafi (Libyan sitting head of state at the time of indictment and issuance of arrest warrant), Uhuru Kenyatta (sitting Kenyan President), Laurent Gbagbo (former Ivorian President), William Ruto (sitting Kenyan Vice President), Jean-Pierre Bemba Gombo (former Vice President, Central African Republic), Abdel Rahim Hussein (current Defence Minister of Sudan), and Saif Al-Islam Gaddafi (acting Libyan *de facto* Prime Minister at the time of indictment and issuance of arrest warrant). See International Criminal Court, “*All Cases*”, op cit, note 109.

¹¹² These are: four state referrals, two UN Security Council referrals, and two ICC Prosecutor’s *proprio motu* referrals. See International Criminal Court, “*Situations and Cases*”, online: <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/pages/situations%20and%20cases.aspx>

¹¹³ See International Criminal Court, “*Preliminary Examinations*”, online: <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx>.

(including the equality of all states' high-ranking officials).¹¹⁴ It shows that within the ICC mechanism, "all animals are equal, but some animals are more equal than others".¹¹⁵ The situation raises the question as to whether the anti-state-immunity regime of the ICC mechanism is solely meant for African state officials.

As noted by Edwin Bikundo, "The contradiction within universality is how a court set up by the international community with the potential to cover all states whether members of the Rome Statute or not only has African cases even after utilizing all the various means by which it may be seized of jurisdiction."¹¹⁶ Bikundo also comments¹¹⁷:

... In an empirical sense, Africans are the only ones currently under active investigation and trial at the ICC. ... The beings tried are broadly familiar as sacrificial scapegoats while those doing the trying are familiar as sovereigns. A very specific form of scapegoating is done in international criminal law. The accused are supposed to bear the highest responsibility for the worst crimes known to humanity. The selection of Africans exclusively for this dubious honour, while not random, is definitely arbitrary. It is not random because there are real *prima facie* grounds indicating that persons from the region selected are responsible in some way for the commission of absolutely heinous acts It is arbitrary however because out of a total human population in the billions the few Africans selected neither have the monopoly on international criminality ... nor can they be singled out solely as the very worst offenders.

Since the entry into force of the *Rome Statute*, there has been commission of crimes under the *Rome Statute* by high-ranking state officials in many other regions. The ICC has not deemed it fit to address the crimes in these other regions.¹¹⁸ For example, US officials allegedly committed/ are committing a series of crimes against humanity against persons held in the US

¹¹⁴ See, e.g., Isanga, Joseph, "Response to Philip Blosser", in Adolphe, Jane et al (eds), *St Paul, The Natural Law, and Contemporary Legal Theory* (Maryland, USA: Lexington Books, 2012) 131 at 137; Simpson, Gerry, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (New York: Cambridge University Press, 2004).

¹¹⁵ See Orwell, George, *Animal Farm* (London: Secker & Warburg, 1945) at 52.

¹¹⁶ Bikundo, Edwin, "The International Criminal Court and Africa: Exemplary Justice" (2012) 23 *Law Critique* 21 at 22-23. See also Murithi, Tim, "The African Union and the International Criminal Court: An Embattled Relationship" (2013) No 8 IJR Policy Brief 1 at 2-4.

¹¹⁷ Bikundo, Edwin, *op cit*, note 116 at 27-28.

¹¹⁸ See Murithi, Tim,, *op cit*, note 116 at 3, para 1.

detention facilities in Guantanamo Bay, Cuba. Similar allegations were made against US officials regarding detainees in the Abu Ghraib Jail in Iraq and also in Afghanistan.¹¹⁹ The US has strangely styled most of these detainees “unlawful combatants”.¹²⁰ These are in addition to the many allegations of war crimes that US officials have committed in Iraq, Afghanistan, and in some other states.¹²¹ Although the US is not a party to the Rome Statute, the UNSC has the power to refer these situations to the ICC¹²², but has refused to do so.

Other notorious instances are the alleged war crimes and genocide committed by both sides during the recently-concluded Sri Lankan civil war¹²³; alleged war crimes by UK officials in Iraq and Afghanistan¹²⁴; Russia’s alleged “ethnic cleansing” of Georgians in South Ossetia, Georgia¹²⁵; the Tibet genocide in northern China alleged to have been committed by some

¹¹⁹ See Global Policy Forum (GPF), “*Torture and Prison Abuse*”, online: <http://www.globalpolicy.org/us-un-and-international-law-8-24/torture-and-prison-abuse.html>; Kyriakidis, Kleanthis, “*Guantanamo and Abu Ghraib Revisited*”, Open Democracy, 30 March 2012, online: <<http://www.opendemocracy.net/kleanthis-kyriakidis/guantanamo-and-abu-ghraib-revisited>>; Jaffer, Jameel & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (New York: Columbia University Press, 2009); Gondi, James, “*War Crimes Tribunals, Mass Atrocities and the Role of Humanity’s Law in Transnational Justice*” (2014) IJTJ 1 at 3.

¹²⁰ Goppel, Anna, *Killing Terrorists: Amoral and Legal Analysis* (Berlin: Walter de Gruyter, 2013) at 122; Danner, Allison M, “*Defining Unlawful Enemy Combatants: A Centripetal Story*” (2007) 43 TILJ 1.

¹²¹ See Gondi, James, op cit, note 119 at 3; See also Schabas, William, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012).

¹²² See *Rome Statute*, supra, note 51, art 13(b).

¹²³ Gondi, James, op cit, note 119 at 3. See also International Crimes Evidence Project (ICEP) Sri Lanka, “*Island of Impunity? Investigation into International Crimes in the Final Stages of the Sri Lankan Civil War: Confidential Embargo Until 6 February 2014*”, online: <<http://www.colombotelegraph.com/.wp-content/uploads/2014/here.pdf>>.

¹²⁴ See Arbuthnot, Felicity, “*The British Military in Iraq: A Legacy of War Crimes and Atrocities*” Global Research, 3 September 2010, online: <<http://www.globalresearch.ca/the-british-military-in-iraq-a-legacy-of-war-crimes-and-atrocities/20878>>. See also Braithwaite, John & Ali Wardak, “*Crime and War in Afghanistan, Part I: The Hobbesian Solution*” (2013) 53 BJC 179; MacManus, Deidre et al, “*Violent Offending by UK Military Personnel Deployed to Iraq and Afghanistan: A Data Linkage Cohort Study*” (2013) 381 The Lancet 907. Recently, the Public Interest Lawyers (PIL) and the European Centre for Constitutional and Human Rights jointly lodged a formal complaint with the ICC Office of the Prosecutor against some former UK high-ranking state officials and called for their investigations for war crimes committed during the occupation of Iraq. These former officials include the former Chief of Staff, General Peter Wall, former Defense Secretary, Geoffrey Hoon, and former Defence Minister, Adam Ingram. See *Communication to the Office of the Prosecutor of the International Criminal Court: The responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008*, submitted on 10 January 2014 by the ECCHR and the PIL, online: <[file:///C:/Documents%20and%20Settings/Owner/My%20Documents/Downloads/UKICC-Communication-2014-01-10_public%20\(1\).pdf](file:///C:/Documents%20and%20Settings/Owner/My%20Documents/Downloads/UKICC-Communication-2014-01-10_public%20(1).pdf)>.

¹²⁵ Amnesty International, *Civilians in the Aftermath of War: The Georgia-Russia Conflict: One Year On* (London: Amnesty International Publications, 2009); Mullins, Christopher W, “*War Crimes in the 2008 Georgia-Russia Conflict*” (2011) 51:6 Brit J Criminol 918.

highest-ranking Chinese state officials¹²⁶; and the current Syrian civil war¹²⁷. Yet others are the 2006 Israel-Lebanon war¹²⁸, the Israel-Palestine continuous armed conflicts¹²⁹; and the ongoing conflict situations in Burma (Myanmar), Yemen, the Philippines, Chechnya, Crimea (Ukraine), and Mexico.¹³⁰

This selective justice along geographic and nationality lines is further exacerbated by some powers that the *Rome Statute* confers on the UNSC in relation to the ICC. Experience has shown that due to the high-level politics in the UNSC, the Council would not refer to the ICC a situation in any of its permanent member states or their allies. It would only refer situations in less developed states in which none of the permanent members has an interest. This position is exemplified by the fact that out of all the situations of alleged commission of grave *Rome Statute* crimes by high-ranking state officials in the whole world, the Council has only managed to refer the situations in Darfur, Sudan¹³¹ and in Libya¹³².

Furthermore, the power that the *Rome Statute* vests in the UNSC to defer (suspend) an investigation or trial before the ICC¹³³ (though not yet used) stands to unduly influence the anti-state-immunity effort of the ICC mechanism. By this deferral power, the UNSC powerful

¹²⁶ Smith, Warren W, *Tibet's Last Stand? The Tibetan Uprising of 2008 and China's Response* (Maryland, USA: Rowman & Littlefield, 2008) at 132; Petit, Robert et al, "Exploring Critical Issues in Religious Genocide: Case Studies of Violence in Tibet, Iraq and Gujarat" (2007) 40:1 CWRJIL 163.

¹²⁷ Human Rights Watch, "Syria and the International Criminal Court: Questions and Answers, September 2013", online: <http://www.hrw.org/sites/default/files/related_material/Q&A_Syria_ICC_Sept2013_en_0.pdf>.

¹²⁸ Sharp, Jeremy M et al, *Lebanon: The Israel-Hamas-Hezbollah Conflict* (Washington DC: Congressional Research Service, The Library of Congress, 2006).

¹²⁹ Human Rights Watch, "Israel/Palestine: Growing Abuse in West Bank", 21 January 2014, online: <http://www.hrw.org/news/2014/01/21/israelpalestine-growing-abuse-west-bank>>; Zanoliti, Jim, *The Palestinians: Background and US Relations* (Washington DC: Congressional Research Service, 2014).

¹³⁰ Wars in the World, "List of Ongoing Conflicts", online: < <http://www.warsintheworld.com/?Page=static1258254223>>.

¹³¹ *UN Security Council Resolution 1593(2005), Referring the Situation in Darfur, Sudan to the Prosecutor of the International Criminal Court*, S/RES1593 (of 31 March 2005) ("UNSC Resolution 1593").

¹³² *UN Security Council Resolution 1970 (2011), Referring the Situation in Libya to the Prosecutor of the International Criminal Court*, S/RES/1970 (of 26 February 2011) ("UNSC Resolution 1970").

¹³³ *Rome Statute*, supra, note 51, art 16.

member states can perpetually frustrate the ICC's investigation or trial of any of their officials or those of their allies, more so since the deferral is renewable.¹³⁴

In addition to geographic and nationality lines, the ICC mechanism also practices selective justice along thematic lines. *Regulation 33* (titled "Selection of cases within a situation") of the *Regulations of the Office of the Prosecutor*¹³⁵ gives the ICC's Office of the Prosecutor a wide discretion to select "the most serious crimes" committed within a situation as potential cases before the Court based, *inter alia*, on "gravity" and "the interests of justice".¹³⁶ Neither the Regulations, nor the *Rome Statute*, define these terms. Pursuant to this discretion, the ICC Prosecutor has adopted a "Thematic Approach" to investigation and prosecution of *Rome Statute* crimes. The approach entails selecting or prioritizing a particular theme(s) of crimes for investigation and prosecution and disregarding the rest that do not involve the theme(s).¹³⁷ Applying this approach, the OTP refused to investigate the situations in Iraq, Palestine, and Venezuela, respectively.¹³⁸ The implication of this approach for the success of the ICC mechanism's efforts at abolishing state immunity is that the immunity-induced impunity of high-ranking state officials, as regards the non-selected crimes, continues. If a culpable officer's crimes do not fall within the selected theme, he goes free. The major general defect of this

¹³⁴ Ibid.

¹³⁵ 2009, ICC-BD/05-01-09.

¹³⁶ See also the *Rome Statute*, supra, note 51, art 53(1)(a)-(c).

¹³⁷ See Ambos, Kai & Ignaz Stegmiller, "Prosecuting International Crimes at the International Criminal Court: Is There a Coherent and Comprehensive Prosecution Strategy?" (2013) 59:4 Crime Law Soc Change 415 at 423-426; FICHL, "Thematic Investigation and Prosecution of International Sex Crimes", a paper delivered at a Seminar Organized by the Forum for International Criminal and Humanitarian Law, held on 7-8 March 2011 at the University of Cape Town, South Africa, at 1.

¹³⁸ See AMICC, "Communications to the ICC Regarding the Situation in Iraq", online: <<http://www.amicc.org/docs/iraq.pdf>>; AMICC, "Communications to the ICC Concerning the Situation in Gaza", inline: <http://www.amicc.org/docs/Gaza.pdf>; ICC, "OTP Letter to Senders: Re Venezuela, 9 February 2006", online: <http://www.amicc.org/docs/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf>; O'Brien, Melanie, "The Impact of the Iraq Communication of the Prosecutor of the International Criminal Court on War Crimes Admissibility and the Interests of Victims" (2008) UCDLR 1 at 5; Caban, Pavel, "Preliminary Examinations by the Office of the Prosecutor of the International Criminal Court" (2011) 2 CYIL 199 at 201-208; AMICC, "Palestine's Status as a Non-member Observer Status in the United Nations and Its Implications for the International Criminal Court", online: <http://www.amicc.org/docs/Palestine_and_the_ICC.pdf>.

approach is that where state officials commit grave *Rome Statute* crimes that do not fall within the selected theme(s), their victims are totally denied justice.¹³⁹ For Guerreiro¹⁴⁰, one of the imperfections of the ICC system is the “‘principle of selective justice’, according [to] which only some cases can be prosecuted by the ICC.” According to him:

The use of this criterion, as a way of choosing the cases that would be pursued by the Court affects, negatively, the mission to uphold international law, since some cases receive more attention.... This represents what is known as double standard ... This is a rekindling of the criteria used by the ad hoc courts...¹⁴¹

Although prioritization of cases to be brought before the ICC may sometimes be necessary, a poor and unbalanced approach to this stands to hamper the mechanism’s efforts to abolish state immunity.

These analyses show that the weakness of selective justice deals a serious blow to the ICC mechanism’s attempt at disregarding/abolishing state immunity. In addition to this is a weakness stemming from the preservation of bilateral immunity agreements between states, which is examined next.

5.5.2 Preservation of Bilateral Immunity Agreements

The *Rome Statute* contains some provisions that render the ICC mechanism’s efforts to abolish state immunity counter-productive. One such provision preserves the validity of bilateral immunity agreements concluded between states. By article 27(2) of the *Statute*, it could be recalled, “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”. The importance of this provision cannot be underestimated, as it

¹³⁹ See Phooko, op cit, note 107 at 206.

¹⁴⁰ Guerreiro, Alexandre, “*From Breisach to Rome: International Court’s Long Road*”, op cit, note 63 at 36.

¹⁴¹ Ibid. See also Fu, Judy, “*The International Criminal Court at Crossroads*” (2008)1:1 IICJ 14 at 16.

eviscerates the cover for criminal impunity which state immunity and its allied jurisdictional bars¹⁴² had hitherto engendered for some state officials.

However, the value of this provision is seriously undermined by a parallel provision of the *Rome Statute*. Under article 98:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the state ... immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

States that are not parties to the *Rome Statute* and/or are unwilling to cooperate with the ICC will find the provision a valuable tool for exempting their high-ranking officials from the Court's reach.¹⁴³ Accordingly, the US has had no hesitation in taking advantage of this provision by using its political and economic clout to induce some other states (especially less developed states) to conclude Bilateral Immunity Agreements (BIAs) with it. Under any of these BIAs, the other state undertakes not to surrender any national of the US to the ICC. The other state shall also not refer to the ICC any *Rome Statute* crime that a US national has committed, whether within or without the territory of this other state.¹⁴⁴ The US has already concluded these agreements such BIAs (also known as "Article 98 Agreements", "Impunity Agreements", or

¹⁴² See, e.g., Nkusi, Fred Kennedy, "Immunity of State Officials Before the International Criminal Court (ICC): The Indictment of President Al-Bashir" (2013) 1:1 Arizona JICL 1 at 4.

¹⁴³ See generally Iverson, James M, "The Continuing Functions of Article 98 of the Rome Statute" (2012) 4:1 GoJIL 31; KreB, Claus, "The International Criminal Court and Immunities under International Law for States Not Parties to the Court's Statute", in Bergsmo, Morten & Ling Yan (eds), *State Sovereignty and International Criminal Law* (Beijing: Torkel Orpsahl, 2012) at 223.

¹⁴⁴ See AMICC, "US & ICC: Bilateral Immunity Agreement Campaign: A Campaign for US Immunity from the ICC", online: <<http://www.amicc.org/usicc/biacampaign>>.

“Bilateral Non-surrender Agreements”¹⁴⁵) with more than one hundred other states to ensure that no US official is surrendered to the ICC.¹⁴⁶ Pursuant to its BIA campaign, the US has also enacted the *American Servicemembers’ Protection Act*¹⁴⁷ (“*ASPA*”). Apart from vetoing any collaboration with the ICC, the *ASPA* abrogates foreign economic and military support for any state that refuses to sign a BIA with the US.¹⁴⁸ Above all, the *ASPA* authorizes the US President to use all means to release any US personnel detained or imprisoned by, on behalf of, or at the request of the ICC, and individuals detained or imprisoned for official actions taken on behalf of the US.¹⁴⁹

Clearly, the ultimate implication of the insertion of *article 98* in the *Rome Statute* is the weakening of the of the ICC mechanism’s efforts to abolish state immunity and overcome its numerous problems.¹⁵⁰ The outcome is the promotion and legalization of international criminal impunity among high-ranking state officials.

5.5.3 Jurisdictional Politics as to Certain Crimes

Another weakness of the ICC mechanism is the significantly high level of politics entrenched in the *Rome Statute* regarding the ICC’s substantive, temporal, and personal jurisdiction over some international crimes. This is mostly felt in the areas of war crimes and the crime of aggression. These are examined below.

¹⁴⁵ CICC, “*A Universal Court with Global Support: USA and the ICC: Bilateral Immunity Agreements*”, online: < <http://www.iccnw.org/?mod=bia>>.

¹⁴⁶ Ibid. See also CICC, “*Status of US Bilateral Immunity Agreements (BIAs)*”, online: < http://www.iccnw.org/documents/CICCFS_BIAstatus_current.pdf>.

¹⁴⁷ Pub L No 107-206, 116 Stat 820 (2002).

¹⁴⁸ Ibid, ss 2004-2007. See also CICC, “*A Universal Court with Global Support: USA and the ICC: Legislation Prohibiting Aid*”, online: < <http://www.iccnw.org/?mod=legislation>>.

¹⁴⁹ *ASPA*, supra, note 147, s 2008. See also AMICC, “*US & ICC: Congressional Update: Anti-ICC Legislation*”, online: <<http://www.amicc.org/usicc/legislation>>.

¹⁵⁰ It should be noted that there has been controversy over whether this is a lawful application of article 98, but this controversy has had no practical impact on the US practice described here.

5.5.3.1 Politics as to War Crimes Jurisdiction

The general rule under the *Rome Statute* is that the moment a state becomes a party to the Statute by ratifying it, that state automatically accepts the Court's jurisdiction.¹⁵¹ Thus, as from the date of ratification, the ICC can start exercising jurisdiction over *Rome Statute* crimes committed by the state's nationals or on its territory.

Unlike genocide and crimes against humanity over which the rule applies without further conditions, however, the case of war crimes is different. Article 124 of the *Rome Statute* gives a state the discretion, upon becoming a party to the Statute, to declare that for a period of seven years after the entry into force of the Statute for that state, it does not accept the Court's jurisdiction with respect to war crimes allegedly committed by its nationals or on its territory. This is to say that a state can "opt-out" of the ICC's jurisdiction over war crimes by its nationals or on its territory for a transitional period of seven years from the date of its ratification of the *Rome Statute*. France and Colombia have made such declarations.¹⁵²

Technically, it is very difficult to understand the practical importance of the inclusion of this article in the *Rome Statute*, since it is capable of weakening the ICC with respect to certain war crimes situations. Upon a critical look, however, it appears that it was inserted to serve some political interests¹⁵³, i.e., to exempt from the ICC's jurisdiction, at least temporarily, the powerful states' high-ranking officials and those of their allies who have become more notorious for war crimes, although any state party may take advantage of the provision. By this provision, the ICC

¹⁵¹ *Rome Statute*, supra, note 51, art 12.

¹⁵² Triffterer, Otto, *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, 2nd ed (Munich, Germany: Verlag CH Beck, 2008) at 1770-1771.

¹⁵³ Ibid at 1767-1768.

cannot try officials who are shielded from trial by their deferring states. The intriguing puzzle is expressed by William Schabas¹⁵⁴ who questions:

... If a State declares that it does not accept the Court's jurisdiction over war crimes, does this mean that its nationals [officials] cannot be prosecuted, even if the crime is committed on the territory of another State Party, as would ordinarily be the case? Does article 124 allow the creation of a privileged group of nationals [state officials] who are insulated from prosecution by the Court for war crimes, wherever they are committed? ...

Whatever the motive, the outcome is a weakness of the ICC mechanism whose presence and functioning leaves room for immunity to subsist and allows criminal impunity among high-ranking state officials to persist.

5.5.3.2 Politics of Jurisdiction as to the Crime of Aggression

For all other crimes contained in the *Rome Statute*, the commencement of the ICC's jurisdiction was upon entry into force of the *Statute*.¹⁵⁵ For the crime of aggression, on the other hand, commencement of the Court's jurisdiction was postponed indefinitely – pending the adoption by a Review Conference of states parties to the Statute of a provision defining the crime and stipulating the conditions for exercise of jurisdiction over it.¹⁵⁶

The consequence of this jurisdictional postponement for the ICC mechanism's regime against state immunity was that pending the adoption of the definition, high-ranking state officials perpetrating this crime could not be stripped of their immunity and prosecuted before the ICC. This means that, as regards the crime of aggression, the ICC mechanism could not

¹⁵⁴ Schabas, William A, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 1193.

¹⁵⁵ The Statute entered into force on July 1, 2002. See United Nations, "Rome Statute of the International Criminal Court", online: < <http://www.un.org/law/icc/index.html>>; The Peace and Justice Initiative, "When Does the ICC Statute Enter Into Force?", online: < <http://www.peaceandjusticeinitiative.org/implementation-resources/when-does-the-icc-statute-enter-into-force>>.

¹⁵⁶ See the *Rome Statute* supra, note 51, arts 5(2), 121 and 123.

respond to the problems of the state immunity rule. This position undermines the mechanism, more so, given the extreme gravity of the crime in international law. Thus, culpable state officials would continue to evade legal accountability, and their impunity in relation to this crime would flourish, while justice continues to elude their victims.

According to some sources, the fundamental reason for this jurisdictional postponement over this crime was that, during the negotiation of the *Rome Statute*, there was no agreement on how the crime should be defined.¹⁵⁷ Upon a critical appraisal, however, it could again be argued that this jurisdictional postponement was politically motivated¹⁵⁸ to shield from the ICC's jurisdiction high-ranking officials of some states, more especially the powerful. It was not necessarily based on non-existence of an acceptable definition, since various international instruments¹⁵⁹ contained definitions of the crime of aggression before the negotiation of the *Rome Statute*, although it was possible to have a valid divergence of views.

Eventually, a definition of this crime was adopted by a Review Conference in 2010.¹⁶⁰ Under this amendment, the jurisdictional politics still continues. The actual commencement of the Court's jurisdiction over the crime was again postponed to the future.¹⁶¹ Even then, discretion is given to a state party to accept or refuse the Court's jurisdiction when aggression is committed by its officials or agents¹⁶², and the Court cannot try aggression when it is committed by the

¹⁵⁷ See Kirsch, Philippe & Darryl Robinson, "Reaching Agreement at the Rome Conference", in Cassese, Antonio et al (eds), *The Rome Statute of the International Criminal Court: A Commentary, Vol 1* (Oxford: Oxford University Press, 2002) 67 at 78.

¹⁵⁸ See, e.g., Triffterer, Otto, op cit, note 152 at 135.

¹⁵⁹ See, e.g., *Nuremberg Charter*, supra, art 6(a); *Tokyo Charter*, supra, art 5(1); *Draft Code of Offences against the Peace and Security of Mankind*, 1950, UN Doc A/CN.4/25; (1950) II YILC 253; *UN General Assembly Resolution on the Definition of Aggression*, UNGA Res 3314 (XXIX), UN GAOR 29th Sess., Supp. No. 31 (of 14 December 1974), art 1.

¹⁶⁰ *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, 2010, RC/Res.6, Annex I, para 2.

¹⁶¹ Ibid, paras 3(2)-(3) and 4(2)-(3).

¹⁶² Ibid, para 3(4).

officials/agents or on the territory of a state non-state party to the *Rome Statute*.¹⁶³ Above all, the Court cannot try aggression unless the UNSC first determines that a situation of aggression exists.¹⁶⁴ This, in reality, is a recognition of the high politics nature of this crime.

The ultimate implication of all of this political furor over the crime of aggression, it could be argued, is to further weaken the ICC mechanism as to curbing state immunity in this matter. The abolition of the state immunity rule over the crime under this mechanism is a mere sham. The Court is tactically denied the power to lift the cloak of the immunity of high-ranking state officials who commit this crime and to hold them individually accountable for it. Essentially, culpable state officials may continue to commit this crime with impunity and their victims may hope for but would not find justice. Thus, this is one area where some of the difficulty arises from the fact that state responsibility may be the more appropriate (or at least more practical) avenue for redress.

All these politics go a long way to re-affirm the position that states, especially the powerful ones, are tenaciously inclined to allow aggression to retain its original status as a state crime that is subject to the regime of state responsibility, as opposed to individual responsibility, since the crime is essentially committed against the territorial integrity and political independence of a state and not against individuals. However, this inclination could be attacked on the ground that, like other international crimes, aggression is a crime against international law and is also planned and executed (even if to a lesser degree) by individuals. Thus, the individual officials that plan and execute it should not be allowed to hide under the cover of state responsibility to avoid personal accountability, when their counterparts who commit other (and

¹⁶³ Ibid, para 3(5).

¹⁶⁴ Ibid, para 3(6)-(8).

even less grave) species of international crimes are stripped of their immunity and held personally accountable.

5.6 Overview

In addition to the specific shortcomings of each of the response mechanisms earlier discussed, some general weaknesses are common to all of them. First, all the mechanisms are focused exclusively on what are referred to as the “core international crimes”¹⁶⁵, including genocide, war crimes, crimes against humanity (including torture), and the crime of aggression.¹⁶⁶ Thus, other international crimes that do not belong to this category do not come under the radar of the anti-state-immunity crusade of the international criminal justice system. For example, neither of the *ad hoc*/hybrid tribunals, nor the ICC, has jurisdiction over the international crime of piracy.¹⁶⁷ Thus, none of these tribunals can lift the immunity of a culpable high-ranking state official to be tried for this crime.

Overall, the commission of international crimes that do not belong to the “core crimes” category is likely to continue with impunity by state officials, and their victims will remain

¹⁶⁵ See, e.g., the *Rome Statute*, supra, note 51, art 5; *ICTY Statute*, supra, note 6, arts 2-5; the *ICTR Statute*, supra, note 6, arts 2-4; the *Statute of the Special Court for Sierra Leone* (“SCSL Statute”), 2002, 2178 UNTS 138, arts 2-4; the *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, (the “ECCC Law”) 2001, as amended on 27 October, 2004, NS/RKM/1004/006, also online: <http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf>, arts 3-7; the *Statute of the Iraqi Special Tribunal* (“IST Statute”), 2003 (2004) 42 ILM 231, supra, art 1; *UNTAET Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences* (East Timor), UNTAET/REG/2000/15 (6 June, 2000), s 1.3; the *Nuremberg Charter*, supra, note 2, art 6; and the *Tokyo Charter*, supra, note 2, art 5.

¹⁶⁶ Wharton, Sara, “*Redrawing the Line: International Crimes beyond the Rome Statute*”, UNSW Law, 10 May 2013, online: <<http://www.law.unsw.edu.au/news/2013/05/redrawing-line-international-crimes-beyond-romestatu>>; Choi, Tae Hyun, “*Nationalized International Criminal Law: Genocidal Intent, Command Responsibility, and an Overview of the South Korean Implementing Legislation of the ICC Statute*” (2011) 19:3 Michigan State JIL 589 at 590; Natarajan, Mangai, “*Introduction*”, in Natarajan, Mangai (ed), *International Crime and Justice* (Cambridge: Cambridge University Press, 2011) xxiii at xxvi.

¹⁶⁷ See, e.g., Einersen, Terje, “*New Frontiers of International Criminal Law: Towards a Concept of Universal Crimes*” (2013) 1:1 BJCLCJ 1 at 4-5; Bo Marta, “*Emerging Voices: Piracy vs. Core Crimes – Assessing the Consequences of the Juxtaposition between Transnational and International Crimes*”, *Opinio Juris*, 6 September 2013, online: <<http://opiniojuris.org/2013/08/09/emerging-voices-piracy-vs-core-crimes-assessing-the-consequences-of-the-juxtaposition-between-transnational-and-international-crimes/>>.

without remedy. It appears that the only possible exception to this practice is the universal criminal jurisdiction mechanism where a high-ranking state official could be denied immunity and tried for any other crime for which universal jurisdiction is available under customary international law, but only if there is political will on the part of the forum state to do so. The prioritization may be justified, *inter alia*, on limited resources and the need not to congest the tribunals and the ICC with cases. But the level of injustice that victims stand to suffer for the non-inclusion of these other crimes in the jurisdiction of these tribunals and the ICC may necessitate a reappraisal of the prioritization.

The second and most significant weakness is that the efforts of the international criminal justice system to disregard/abolish state immunity are generally directed at weaker states. This is more visible in the *ad hoc* international criminal tribunal, the hybrid tribunal, and the International Criminal Court mechanisms. Since the latter part of the twentieth century, the only *ad hoc* international criminal tribunals that have been established by the United Nations Security Council are the ICTY and ICTR. As earlier noted, the overturning of the immunity of state officials under the constitutive instruments of these tribunals has been done in regard to the weak break-away states of the former Yugoslavia in Eastern Europe and Rwanda in Africa, respectively.¹⁶⁸ There is no doubt that deserving situations in some weaker states like Syria, Yemen and Sri Lanka have not been addressed. However, the fact that only officials of weaker states have so far been deprived of their immunity, when there is also strong evidence of culpability of their counterparts of the stronger states, goes to show this lopsidedness.

As for the hybrid tribunals, the Iraqi Special Tribunal/Iraqi Higher Criminal Court was created, *inter alia*, to try and punish high-ranking Iraqi state officials.¹⁶⁹ The anti-immunity

¹⁶⁸ See the *ICTY Statute*, *supra*, note 6, arts 1, 7-8; the *ICTR Statute*, *supra*, note 6, arts 1, 6-7.

¹⁶⁹ *IST Statute*, *supra*, note 165, arts 1 and 15.

regimes of the legal instruments of the Extraordinary Chambers in the Courts of Cambodia¹⁷⁰, the Bangladesh Tribunal¹⁷¹, the Special Court for Sierra Leone¹⁷², the East Timor Serious Crimes Panels¹⁷³, and the Senegalese Extraordinary African Chambers¹⁷⁴ target Asian and African officials, while no such regimes have been created to address similar crimes committed in or by officials of the developed states. As already shown, the ICC mechanism, although intended to be universal, has so far been implemented exclusively against officials of African states.

This lopsided practice raises the question whether officials of these less developed states have a monopoly over the commission of international crimes. The answer to this question is in the negative.¹⁷⁵ There have always been situations in all parts of the world where high-ranking state officials commit grave international crimes.¹⁷⁶ For instance, apart from the fact that the ICC has a potentially global mandate to try these crimes but fails to act, some of the crimes are committed by officials of the powerful states within the geographical and temporal jurisdictions of some of the existing *ad hoc* and hybrid tribunals. None of these officials has ever been deprived of his immunity and tried before any of the tribunals. Nor has any such tribunal been established in any of the powerful states to try the international crimes that may have been committed within their territories by their high-ranking officials.

¹⁷⁰ *ECCC Law*, supra, note 165, art 1.

¹⁷¹ *International Crimes (Tribunals) Act*, 1973, No. XIX, as amended, online: < http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=435>, arts 3 and 5.

¹⁷² *SCSL Statute*, supra, note 165, arts 1 and 6.

¹⁷³ *UNTAET Regulation 2000/15*, supra, note 159, ss 2 and 15.

¹⁷⁴ *Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1990* (“*Statute of the Extraordinary African Chambers*”), 2013, online: <<http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers>>, arts 1, 3 and 10.

¹⁷⁵ Palayiwa, Millius, “*Prosecuting Presidents, or The Challenges of International Indictments of African Leaders*”, Congo Forum, online: < <http://www.congoforum.be/en/analysedetail.asp?id=196185&analyse=selected>>.

¹⁷⁶ See, e.g., Von James, Geldern, “*International Criminal Justice: Growing Pains or Incredible Contradictions*” (2011) 28:1 MAC INT’L 81 at 82; Moore, Christopher G, “*The Monopoly of Violence: The Case for Firing General Stanley McChrystal*”, International Crime Authors Reality Check, online: < <http://www.internationalcrimeauthors.com/?p=779>>.

5.7 Conclusion

Each of the mechanisms of response to the problems arising from the application of the state immunity rule in the international criminal justice system contributes to ensuring individual criminal accountability for high-ranking state officials. These mechanisms show that all individuals, irrespective of political status, are formally equal in the international criminal justice system. However, each mechanism has shortcomings that render it substantially ineffective in the crusade to remove state immunity as a cover for international crimes.

The creation of the *ad hoc* international/ hybrid criminal tribunal mechanisms is highly influenced by the interests of the developed states (especially the world powers of the relevant times). The geographical and temporal jurisdictions of the tribunals created under these two mechanisms are very limited. Their legal regimes lack substantive jurisdictional uniformity, as the substantive jurisdiction of each tribunal is dictated by the peculiar historical exigencies and circumstances of a given place at a given time. Above all, these mechanisms either administer victor's justice or have problems with independence and impartiality. The latter defect, for some of the hybrid tribunals, partly arises from their being established within the local court systems of the respective host states that also fund and staff them. As such, these host states wield undue influence over their operations.

As to the universal criminal jurisdiction mechanism, it is susceptible to political abuse, as some states could employ it against the officials of enemy states. Again, economic/political and allied factors, and the desire to maintain friendly international relations, make most states reluctant to apply the mechanism against officials of friendly foreign states. Some of the legal instruments adopted pursuant to this mechanism do not confer universal jurisdiction and/or abolish state immunity in express terms. Some that expressly abolish state immunity

simultaneously provide for limitations on their enforcement, rendering the abolition a nullity. Also, state practice as regards national legislative enforcement of this mechanism is inconsistent. While some states have statutes conferring on their national courts universal jurisdiction over international crimes, others do not. Some states still adhere to the absolute immunity rule in international criminal proceedings before their national courts, while others subject international crimes to their municipal statutes of limitation. The need for extradition treaties between states also hampers the effectiveness of the mechanism. Above all, the anti-state-immunity regime of this mechanism is restricted to immunity *ratione materiae* (functional immunity), but allows immunity *ratione personae* (personal immunity). Thus sitting high-ranking state officials cannot lose their immunity under this mechanism.

One major weakness of the ICC mechanism is selective justice. It has, so far, geographically concentrated on Africa to the exclusion of deserving situations in other regions of the world. The selective justice is also seen in the nationalities of state officials whom the mechanism is, in practice, inclined to proceed against. Officials of the developed states and their close allies do not come onto the ICC's radar, despite the gravity of their crimes (although culpable officials of a few developing states, like Yemen and Sri Lanka, have also ignored). The mechanism is also selective as to the heads of crimes it addresses. The ICC's OTP has an unduly wide discretion to pick and chose the situations and categories of *Rome Statute* crimes over which the ICC will exercise jurisdiction. Furthermore, the UN Security Council unduly influences this mechanism. This is done by its permanent member states' self-interested exercise of the powers the Council has under the *Rome Statute* to refer situations to the ICC. Also, the Council's power to defer investigations or trials by the ICC, although not yet exercised, is potentially a problem. These permanent member states abuse the former power by using it to

shield their officials and those of their allies from the ICC, and could likely abuse the latter power the same way.

In addition, the mechanism's provision for bilateral immunity agreements (BIAs) concluded between states essentially stands to defeat its efforts to abolish state immunity. In fact, the US takes advantage of these BIAs to shield its officials from the ICC's jurisdiction. Furthermore, although all the Rome Statute crimes are also customary international crimes susceptible to universal jurisdiction, the ICC has no universal jurisdiction over them. Thus, where they are committed within the territory, or by the officials of, a non-state party to the *Rome Statute*, the ICC ordinarily lacks jurisdiction to try them. States parties to the *Rome Statute* have some discretion to defer the ICC's jurisdiction over war crimes and the crime of aggression committed on their territories, or by their officials. Moreover, a state party has the discretion to reject the ICC's jurisdiction over aggression committed by its officials.

Finally, besides these peculiar weaknesses, all the mechanisms have two major common shortcomings. The first is that almost all these mechanisms' efforts against state immunity are restricted to the "core international crimes" (genocide, war crimes, crimes against humanity, and the crime of aggression). While this may be a necessity in view of limited resources and the need for non-saturation of the relevant tribunals and courts with cases, the disadvantage is that other species of international crimes committed by state officials may be left unaddressed and their victims denied justice. The second is that this crusade is lopsided against high-ranking officials of the weaker states and in favour of those of the powerful states.

The overall implication of all these weaknesses of the mechanisms is that the whole legal response to the problems arising from the application of the state immunity rule in the

international criminal justice system remains weak. Consequently, the problems sought to be overcome by the mechanisms may continue to flourish.

CHAPTER 6

CONCLUSION

6.1 Introduction

This thesis has examined the problems arising from the application of the state immunity rule in the international criminal justice system and the achievements and weaknesses of the legal mechanisms adopted by the international community to respond to these problems. This chapter summarizes the results of this research by setting out findings, suggestions and conclusion.

6.2 Findings

State Immunity Rule:

1) The state immunity rule evolved to guarantee the sovereign equality of all states, big and small, mighty and weak, by ensuring that no one state or its high-ranking officials are unnecessarily brought into litigation in the courts of another state. This rule is also meant to ensure that the smooth governance of states is not hampered or distracted by judicial proceedings, civil and criminal, against their high-ranking officials before foreign courts.

2) Application of the state immunity rule in the international criminal justice system leads to many problems which contradict the rationales for the rule and undermines the individual accountability and administration of justice missions of the international criminal justice system. One of these problems is that the protection accorded by the rule induces among some high-ranking state officials a culture of impunity as regards violation of peremptory international legal norms. This impunity is manifest in the officials' habit of systematic commission of heinous international crimes, such as genocide, torture, aggression, war crimes, and crimes against humanity. It also manifests in their violation of other states' territorial integrity and political

independence by means of senseless wars and other acts of aggression, which erodes the sovereign equality rationale behind the rule. Other problems arising from the application of the rule include perpetuation of injustice against victims of international crimes committed by high-ranking state officials, creation of social inequality between state officials and ordinary individuals as regards legal accountability for international crimes, political self-perpetuation, and bad governance.

Due to the foregoing problems, the state immunity rule has become unpopular in the international criminal justice system. Some high-ranking state officials have converted it into a means by which they avoid individual accountability for their international crimes, in which cases the international criminal justice system is effective only against individuals not protected by this immunity. The application of this rule, therefore, defeats its object and purpose, weakens the international criminal justice system, and undermines public confidence in its ability to dispense justice.

Mechanisms of Legal Response:

3) In response to these problems, the international community, among other reasons, has created various legal mechanisms to abolish or avoid the application of the immunity rule in the international criminal justice system. These mechanisms are the old *ad hoc* international criminal tribunal, the use of universal criminal jurisdiction, the modern *ad hoc* international criminal tribunal, the hybrid/internationalized criminal tribunal, and the permanent international criminal court.

Under the two *ad hoc* international criminal tribunal mechanisms (old and modern), the international community establishes *ad hoc* tribunals with international status to try persons who

commit stipulated international crimes within given states/regions during specific time frames.¹ The practice under the universal criminal jurisdiction mechanism is that customary international law confers on all states jurisdiction to try perpetrators of certain international crimes in their national courts, despite their official status, nationalities, place of commission of the crimes, or absence of other jurisdictional connections. This jurisdiction is conferred and exercised on the ground that the prohibitions of these crimes (e.g., genocide, war crimes, crimes against humanity, aggression, and torture) have attained the status of *jus cogens* or peremptory norms.² Due to this status, perpetrators of the crimes are deemed *hostis humani generis* (enemies of all humankind), since the crimes shock the conscience of humanity and affect the international community as a whole. Consequently, every state has a powerful duty *erga omnes* (owed to the whole world), if not necessarily a hard legal obligation in every case, to bring the perpetrators to justice. This customary international law practice is complemented by treaties concluded by states on some specific crimes, which impose on the states parties an obligation *aut judicare aut dedere* – to prosecute or extradite the offender to another state party which is willing to prosecute him or her.

Under the hybrid/internationalized criminal tribunal mechanism, some judicial tribunals are created in some states, often by or at the behest of the international community via the UN, and empowered to try individuals for both domestic and international crimes committed within the territories of the given states at particular points in time.³ The permanent international criminal court mechanism is represented by the current ICC established to administer a globalized international criminal justice on a non-temporary basis. One common denominator of

¹ See the detailed account of these tribunals in Chapters 4 and 5 herein.

² *R v Bow Street Metropolitan Stipendiary Magistrates, Ex parte Pinochet Ugarte (No 3)* [“Pinochet case”] (2000) 1 AC 147 at 288, paras F-G; *Ex parte Quirin*, 1942 317 U.S. 1.

³ See the detailed account of these tribunals in Chapters 4 and 5 herein.

the international-level mechanisms is that immunity is not a bar to the prosecution and punishment of any individual for an international crime before an international criminal tribunal or a competent national court. While immunity does still operate before the courts of states utilizing universal jurisdiction, its application has dwindled as regards international crimes, particularly immunity *ratione materiae*.

4) Pursuant to the anti-state-immunity regimes of these mechanisms, some high-ranking state officials, who would have otherwise been shielded from trials and punishments for international crimes before foreign courts, are today tried and punished for these crimes. Consequently, the state immunity rule has lost its strength in the international criminal justice system.

These mechanisms are commendable, as they ensure equality of all persons, high-ranking state officials and ordinary individuals alike, in international criminal law. They make state officials to understand that they can be subjected to the full weight of international criminal law despite their official positions, and that official status should not be a license to commit international crimes. The mechanisms reduce the impunity with which these officials commit these crimes. They also afford some justice to victims of the crimes who would have otherwise been denied such justice. On the whole, the mechanisms seek to strengthen the international criminal justice system and induce public confidence in it.

Weaknesses in the Response Mechanisms:

5) Despite the usefulness of these mechanisms, each has some shortcomings that undermine its effectiveness in combating the problems associated with the application of the state immunity rule. As a result, high-ranking state officials who commit international crimes

may still go free from legal accountability, and their victims still suffer injustice. On the whole, the shortcomings weaken the anti-state-immunity efforts. The major shortcomings are as follows:

First, Many of the tribunals under the *ad hoc* international criminal tribunal mechanism and some of those under the hybrid criminal tribunal mechanism were created by a few states – always powerful states, and sometimes states which had emerged as wartime victors. The anti-state-immunity provisions of the legal instruments of these tribunals were made by the world powers of the relevant periods in world history, while most other states had no input, which weakens their legitimacy.

Second, although the *ad hoc* international and hybrid criminal tribunals served some good purpose in the absence of a universal criminal court, the geographical and temporal jurisdictions of each tribunal operating under the *ad hoc* international criminal tribunal and the hybrid criminal tribunal mechanisms are very limited. In fact, as regards temporal jurisdiction, each tribunal is a temporary judicial institution and has a completion period beyond which it will not continue to operate. Thus, all international crimes within the tribunal's substantive jurisdiction that are committed outside the stated geographical and/or temporal coverage cannot be tried by the tribunal. Therefore, the immunity of a high-ranking state official who commits these crimes remains unaffected. Furthermore, the tribunals' creation is dependent on the political disposition of the international community at a given time, again highly influenced by the self interest of the world powers. Thus, such tribunals were created in some situations, but not in other deserving situations. Consequently, the immunity of state officials who commit grave international crimes, at times and in places regarding which the international community is not favourably disposed to act, remains intact.

Third, some of these tribunals administer “victor’s justice”. They are judicial institutions created after conflict situations by the victorious parties to try and punish officials of the vanquished parties. Culpable officials of the victorious parties are hardly subjected to trials before them. In addition, the victorious powers appoint their loyalists as judges of some of the tribunals to try their enemies. All these taint the anti-state immunity regimes of some of the tribunals established under these two mechanisms with selective justice, partiality, and lack of independence from external influences. These make the regimes look more like a vendetta mission.

Fourth, with particular regard to the hybrid criminal tribunal mechanism, the fact that most of the tribunals are located within the domestic judicial structure of the state concerned, and are funded by the same state, has in some situations subjected the tribunals to undue external influence from the host state, including using them against their political opponents. When there is need to disregard the immunity of a high-ranking official of the incumbent government and try him before the tribunal, the influence of the government in power may stifle the attempt.

Fifth, under the universal criminal jurisdiction mechanism, some relevant treaties do not expressly abolish immunity. Some states also fail to expressly vest in national courts the universal jurisdiction which either the treaties or the customary norms are intended to confer. Consequently, national courts are left with the difficult task of inferring the intentions of states parties when interpreting the treaties as regards their anti-state-immunity positions. This situation leads to inconsistency in judicial interpretations in that, while the courts of one state may be prepared to disregard immunity in a given circumstance, the courts of another state may not be so prepared. Moreover, political and diplomatic considerations make national courts of states unwilling to invoke this mechanism against high-ranking officials of friendly states. In practice,

the mechanism is sometimes employed only against ordinary individuals and low-ranking officials who are not entitled to state immunity protection, at least *ratione personae* in the case of the later. Similarly, inconsistent legislative practice among states also bedevils the effectiveness of this. Some states have statutes conferring on their national courts universal jurisdiction over international crimes, while others do not. Among states that have enacted such statutes, the categories of international crimes covered and the scopes of punishment differ. Some states also subject international crimes to their municipal limitation statutes. As well, absence of an extradition treaty between two states could stultify the effectiveness of the mechanism, even when the two states are parties to a treaty providing for or intending universal jurisdiction. This is because some universal criminal jurisdiction treaties have no provisions on extradition.

Sixth, the anti-state-immunity regime of the universal criminal jurisdiction mechanism is restricted to immunity *ratione materiae* (functional immunity). Immunity *ratione personae* (personal immunity) survives intact under this mechanism. Thus, where a high-ranking official entitled to immunity *ratione personae* and a low-ranking official that has only immunity *ratione materiae* jointly commit an international crime, the later could be deprived of immunity and punished, while the former may continue to be free forever.

Seventh, this mechanism is prone to abuse by states. While there is fear that the developed states could turn it into an instrument of neo-colonialism and use it to exercise some political influence and manipulation over the leadership of the less developed ones, there is also the fear that developing states could turn it into a machinery for retaliation against the developed states. Thus, the use of this mechanism is not likely to guarantee fair trial of other states' officials, especially those of enemy states.

Eight, the ICC mechanism has, thus far, suffered from practising selective justice. After utilizing all the three referral (trigger) mechanisms available to the Court, all the high-ranking state officials so far denied immunity under the ICC mechanism are those of African states, despite deserving situations in some other regions. Nor is it willing (in some cases) or jurisdictionally able (in most others) to operate against high-ranking officials of the powerful states and their allies who have allegedly committed grave crimes. It is also selective in regard to the situations and heads of crimes it handles. This approach undermines the credibility of the mechanism, especially in the eyes of African states.

The ICC mechanism is unduly influenced by the UN Security Council and its permanent members. This is most visible in the Council's powers under the *Rome Statute*⁴ to refer to the ICC situations in states not parties to the *Statute*. The Council can also defer (suspend) investigations or trials before the ICC⁵, although it has not yet exercised this power. In fact, the Council and its permanent members have used the referral power to protect their interests and those of their allies, and to act against weaker states in which they have no interests. Thus far, the Council has only exercised the referral powers against high-ranking officials of Sudan and Libya.

Another weakness bedeviling the ICC mechanism is its preservation of bilateral immunity agreements (BIAs) between states. On the one hand, the *Rome Statute* abolishes the immunity of state officials regarding crimes falling under ICC jurisdiction.⁶ On the other hand, it recognizes the validity of BIAs.⁷ A BIA bars a state party to it from surrendering to the ICC for prosecution or investigation a national of the other state party, and from co-operating with the ICC as regards such prosecution or investigation. The US, has been using BIAs extensively to

⁴ 1998, UN Doc A/CONF 183/9 (1998); 2187 UNTS 90, art 13(b).

⁵ Ibid, art 16.

⁶ Ibid, art 27.

⁷ Ibid, art 98.

exempt their high-ranking officials, and in fact all its nationals and foreign contractors working for it, from the ICC mechanism and to frustrate the mechanism's anti-state-immunity efforts.

The ICC mechanism is also weakened by limited jurisdictional bases. Out of the five recognized bases of criminal jurisdiction in international law (i.e., the territorial, nationality, protective, passive personality, and universal bases), the Court's jurisdiction is essentially restricted to two (the territoriality and nationality bases).⁸ In particular, the ICC, a notionally universal court that is created to try crimes susceptible to universal jurisdiction (genocide, war crimes, crimes against humanity, and aggression), does not itself have universal jurisdiction over these crimes. The Court can only proceed against a high-ranking state official if such an official is a national of a state party to the *Rome Statute* or if his or her alleged crimes are committed within the territory of a state party to the *Statute*.⁹ Thus, where the crimes are committed by state officials who are not nationals of a state party and/or the crimes in the territory of a non-state-party, the ICC cannot lift the officials' immunity and try and punish them, unless the UN Security Council rarely decides to refer the situation to the Court.

Another factor that undermines the ICC mechanism's capacity to effectively combat the problems of state immunity is jurisdictional politics over certain crimes. First, on becoming a party to the *Rome Statute*, a state still retains the discretion to defer the Court's jurisdiction for seven years with respect to war crimes allegedly committed by its nationals or on its territory.¹⁰ Although this has not been a major problem because most states parties have not taken advantage of it, its retention in the *Rome Statute* poses a potential problem. Second, there is some controversy concerning the ICC's jurisdiction over the crime of aggression. Although a Review

⁸ Ibid, art 12.

⁹ Ibid.

¹⁰ Ibid, art 124.

Conference on the *Rome Statute* has eventually defined aggression¹¹, a state party could reject the ICC's jurisdiction over aggression that its officials have committed.¹² Also, the ICC lacks jurisdiction over aggression committed by nationals or on the territory of a non-state party.¹³ Above all, even where a state party has accepted the ICC's jurisdiction over aggression, the Court's exercise of it is still at the mercies of the UN Security Council. The ICC Prosecutor may not proceed with an investigation in respect of a crime of aggression committed by a state party's high-ranking officials, unless the Security Council has first made a determination of an act of aggression so committed by that states' officials.¹⁴

The implications of these jurisdictional politics for the mechanism's anti-state-immunity regime are twofold. First, where a state party defers or rejects ICC's jurisdiction over war crimes or aggression, as the case may be, committed by its officials or by the officials of another state within the former state's territory, the ICC cannot disregard the immunity of these officials and hold them accountable. Second, where the Security Council, in the case of aggression, is politically motivated to refuse to make a determination that the officials of a state have committed aggression, the ICC cannot disregard the immunity of the officials and try them, even when there is clear and irresistible evidence of their culpability.

Finally, besides these lapses of the respective mechanisms, the efforts of the international criminal justice system to combat the problems of the state immunity rule have two major general weaknesses. The first (especially as regards the *ad hoc* international/ hybrid tribunal and ICC mechanisms) is that it is restricted to the "core international crimes", i.e., genocide, war crimes, crimes against humanity, and the crime of aggression. Other international crimes that fall

¹¹ *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression* (the "*Kampala Accord*" or the "*Kampala Amendment*" or the "*Kampala Accord*"), 2010, RC/Res.6, Annex I, para 2.

¹² *Ibid*, para 3(4).

¹³ *Ibid*, para 3(5).

¹⁴ *Ibid*, para 3(6)-(8).

outside this category, such as aggression and slavery, are not covered, and the immunity of state officials in respect of the latter crimes may, therefore, continue. The second is that the efforts are lopsided against developing states and in favour of developed ones. So far, it is only high-ranking officials of developing states that have lost their immunity and been tried and punished under the various response mechanisms (although there are culpable officials of some developing states that have not been proceeded against).

The need to correct the foregoing weaknesses of the various response mechanisms and better overcome the various problems arising from the application of the state immunity rule in the international criminal justice system, therefore, gives rise to the suggestions made in this thesis. These are reviewed below.

6.3 Suggestions

In view of the foregoing findings, the following suggestions are made with a view to strengthening the anti-state-immunity crusade of the international criminal justice system:

1) All international treaties that confer universal international criminal jurisdiction on the national courts of states but which fail to expressly abolish the state immunity rule as a jurisdictional bar should be amended to abolish this rule. By so doing, the difficulties and inconsistencies of judicial interpretation before national courts as to the anti-immunity position of these treaties will be avoided. This will help to make the anti-state immunity position of the universal criminal jurisdiction mechanism consistent, certain and predictable, although some overzealous national courts may still try to abuse it.

2) States should clearly and unambiguously implement the extradite-or-prosecute obligation from universal-jurisdiction-conferring treaties into their national laws, and other states

parties should hold them accountable if they do not. Moreover, if the universal jurisdiction in question is customary, then states should make sure it is present in their laws. Although the latter suggestion may be harder because customary universal jurisdiction is permissive and not mandatory, states, in the interest of a better and improved international criminal justice system, are urged to implement same. Again, this will help to obviate the interpretational difficulties and inconsistencies which national courts encounter and display when trying to infer the intentions of states parties to relevant treaties and state practice in customary international law as regards universal jurisdiction. Again, states should be encouraged not to subject international crimes to their municipal statutes of limitation. If these suggestions and that in (1) above are implemented, the anti-state-immunity crusade via the universal criminal jurisdiction mechanism will be strengthened.

3) Given the fact that there is universal jurisdiction over the crime of genocide under customary international law, an effort should be made to amend the *Genocide Convention*¹⁵ so as to provide an obligatory universal jurisdiction. This will be more necessary in order to bring the *Convention* in line with other criminal suppression treaties. By so doing, the anti-immunity provision¹⁶ of the *Convention* will become more meaningful and result-oriented.

4) National criminal prosecution authorities should eschew political, economic, and allied considerations in their decisions as to prosecution of foreign high-ranking state officials before their national courts for international crimes. There is no doubt that the desire by states to maintain friendly international relations will make constitute a challenge in this regard. However, due to the fact that systematic commission of international crimes by high-ranking state officials has the effect of destabilizing international peace and security and adversely affects the socio-

¹⁵ 1948, 78 UNTS 277.

¹⁶ Ibid, art 4.

economic and allied well-being of many states, including the forum state, states should increase their willingness to prosecute. To this end, it is further suggested that an international conference on the use of the universal criminal jurisdiction mechanism should be organized, perhaps by the UN, to sensitize states to the numerous advantages of this mechanism in the international criminal justice delivery system and to encourage them to intensify their application of it. In order, however, to allay the fears of abuse of the mechanism by some states, the conference should establish a committee that will ensure fairness in the application of the mechanism by states. Interestingly, a similar was recently convened between the African Union (AU) and the European Union (EU).¹⁷ In view of the global importance of the universal jurisdiction issue, it is strongly suggested that the UN should emulate this AU-EU example.

5) In the light of the numerous weaknesses of the *ad hoc* international criminal tribunal mechanism and the hybrid criminal tribunal mechanism, it is suggested that the two mechanisms be scrapped. In their place, there should be uniformly and concurrently established by the UN, in conjunction with relevant regional¹⁸ and sub-regional¹⁹ international organizations, permanent regional and sub-regional international criminal tribunal mechanisms. This will be similar to the practice in the international human rights system where there are permanent global international

¹⁷ Here, the 10th and 11th meetings of the AU-EU Ministerial Troika held in 2009 addressed the issue of universal jurisdiction in the context of the relationship between the AU and the EU. The meeting discussed and underlined the necessity to fight impunity in the framework of international law to ensure that individuals who commit grave offences such as war crimes and crimes against humanity are brought to justice. The African side stated that there are abusive applications of the principle which could endanger international law and expressed concerns over it. In the end, the two bodies issued a joint communiqué and "... agreed to continue discussions on the issue and to set up a technical ad hoc expert group to clarify the respective understanding on the African and European side on the principle of universal jurisdiction ...". See EU Council Secretariat, The AU-EU Expert Report on the Principle of Universal Jurisdiction, Council of the European Union, Doc 8672/1/09 REV 1 (16 April 2009).

¹⁸ E.g., the Council of Europe, the African Union (AU), and the Organization of American States (OAS).

¹⁹ E.g., the Economic Community of West African States (ECOWAS), the Arab League, the Association of South-East Asian Nations, the South African Development Community, the Andean Community, and the Commonwealth of Independent States (CIS).

human rights protection and enforcement institutions²⁰, as well as those operating at the regional²¹ and sub-regional²² levels of international co-operation. In this regard, the effort by the AU to establish a standing African criminal court may be relevant. It should be noted that out of disenchantment with the ICC mechanism's exclusive focus on African leaders, in particular, and Africans, in general, the AU has resolved to create a criminal chamber within the upcoming African Court of Justice and Human Rights by vesting this court with jurisdiction over international crimes committed by Africans or in Africa.²³ However, the good faith or bad faith of this step by the AU is yet to be clearly determined. In the light of the controversy, it is suggested that the UN itself should be in charge of the creation of such permanent regional and sub-regional international criminal tribunals.

The advantages of the suggested permanent regional and sub-regional international criminal tribunal mechanisms are multifarious. First, the allegation that the *ad hoc* international and mechanism, for example, was created by a few powerful states when other states had no input, will be overcome, since the new mechanisms will be created with the participation of most states and will better represent the intent of the wider international community. Second, their geographical jurisdictions will be much wider, their temporal jurisdictions non-temporary, and their substantive jurisdictions (if they are created concurrently) uniform and consistent. Third,

²⁰ E.g., the Human Rights Committee. See the *International Covenant on Civil and Political Rights*, 1966, 999 UNTS 171, art 28.

²¹ E.g., the European Court of Human Rights, the African Court of Human and Peoples' Rights, and the Inter-American Court of Human Rights. See the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950, ETS 5, art 19; the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III), art 1; and, the *American Convention on Human Rights*, 1969 1144 UNTS 123, art 33(b).

²² E.g., the Community Court of justice of the Economic Community of West African States. See the *Economic Community of West African States' Protocol on the Community Court of Justice*, 1991, A/P.I/7/91, art 2.

²³ See *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 2012, EXP/Min/IV/Rev.7. See also Otieno, Mbori, "The Merged African Court of Justice and Human Rights (ACJ&HR) as a Better Criminal Justice System Than the ICC: Are We Finding African Solution to African Problems or Creating African Problems without Solutions?" (June 3 2014) online: <<http://ssrn.com/abstract=2445344>>.

the tribunals under these mechanisms will be only empowered to try crimes committed after the adoption of their enabling legal instruments and, thus, avoid the weakness of administration of *ex post facto* laws associated with the current *ad hoc* and hybrid tribunal mechanisms. Fourth, there will be no administration of victor's justice, nor an undue focus on weaker and developing states, since the new mechanisms will be permanent and empowered to try crimes committed in both peacetime and armed conflict situations by officials of all states and will operate in all regions and sub-regions. Finally, they will experience much less undue external influence which now bedevils the *ad hoc* international and hybrid tribunal mechanisms.

6) The selective justice practice of the ICC mechanism should be discontinued. The ICC should extend its anti-immunity efforts to all alleged *Rome Statute* crimes that are committed by high-ranking officials of all states, developed and less developed, in all regions of the world, and in all deserving situations. Thus, the current concentration on African officials and situations must end. In the operation of the mechanism, there should be neither untouchable "sacred cows" nor exemplary "scapegoats". Furthermore, the OTP's thematic approach, whereby priority of investigation and prosecution is given to some heads of *Rome Statute* crimes as opposed to others, should be abolished. All international crimes within the *Rome Statute*'s purview are very grave. The injustice meted out to victims of the neglected crimes is also devastating, and the non-subjection to justice of the culpable state officials aggravates their impunity and sends the wrong signal to society.

7) The undue external influence which the UN Security Council and its permanent members wield over the ICC mechanism should be abolished. This should be done in three ways. First, the provision of the *Rome Statute*²⁴ which empowers the Council to refer situations to the ICC should be repealed, since the Council's permanent members are highly selective about the

²⁴ Supra, note 4, art 13(b).

states whose situations they refer to the Court. No doubt, the repeal of this provision will imply that the ICC will no more have any jurisdiction over heinous international crimes committed in the territories of non-member states of the *Rome Statute* when such crimes threaten international peace and security. However, this imminent lacuna can be easily filled by further amending the *Rome Statute* and expanding its jurisdiction by conferring on the Court universal jurisdiction over all *Rome Statute* crimes. This change is readily supported by the fact that all the crimes within the ICC's jurisdiction are already customary international law crimes that are susceptible to universal jurisdiction.²⁵ There is also no doubt that this conferment of universal jurisdiction will raise, on a rather massive scale, the feared problem of imposing a treaty on non-party states. Again, this fear is somewhat misconceived. *Article 38* of the *Vienna Convention on the Law of Treaties*²⁶ clearly provides that although a treaty does not bind a third state without its consent, “Nothing ... precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.”²⁷

Secondly, the provision of the *Rome Statute* that empowers the Council to defer (suspend) investigations or trials by the ICC²⁸ should also be repealed. This provision seriously undermines the mechanism's independence in its fight against the problems of state immunity.

Thirdly, the new provision introduced into the *Rome Statute* by the *Kampala Accord*²⁹ (“*Kampala Amendment*”) whereby the decision of the ICC Prosecutor to proceed with an investigation of a situation of alleged aggression depends on a prior determination by the Council

²⁵ See *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, GA Res 95(1), 1946 (of 11 December, 1946); *UN General Assembly Resolution on the Crime of Genocide*, GA Res 96(1), 1946 (of 11 December, 1946).

²⁶ 1969, 1155 UNTS 331.

²⁷ Emphasis supplied.

²⁸ *Rome Statute*, supra, note 4, art 16.

²⁹ Supra, note 11, para 3(6)-(8).

of the existence of a situation of aggression should also be abolished. This provision leaves the ICC mechanism at the mercies of the Council when it is alleged that aggression has occurred.

8) The provision of the *Rome Statute* which preserves the validity of BIAs concluded between states³⁰ should be repealed outright. This provision obviously undermines the whole anti-state-immunity regime of the ICC mechanism, and the US has turned it into an instrument for the promotion of impunity among its high-ranking officials.³¹ If the anti-state-immunity mission of this mechanism is to be realized, the immunity rule should be abolished without exception.

9) Also the temporal jurisdictional politics over war crimes and the crimes of aggression under the ICC mechanism should be eradicated. The discretion given to a state, upon becoming a party to the *Rome Statute*, to defer the commencement of the ICC's jurisdiction for seven years with respect to war crimes allegedly committed by its nationals or on its territory³² should be abolished outright. In fact, the ICC's jurisdiction over war crimes committed within the territory or by the officials of any state should commence from the date of entry into force of the *Rome Statute*.³³ A similar discretion regarding the crime of aggression³⁴ should also be eradicated. These discretions only increase the impunity of high-ranking state officials in respect of these crimes.

10) More generally, the current practice of restricting the anti-state-immunity disposition to the "core international crimes", i.e., genocide, war crimes, crimes against humanity, and the crime of aggression, should be discontinued. The crusade should extend to all other species of

³⁰ *Rome Statute*, supra, note 4, art 98.

³¹ See, e.g., the *American Servicemembers' Protection Act*, Pub L No 107-206, 116 Stat 820 (2002), ss 2004-2008; AMICC, "US & ICC: Congressional Update: Anti-ICC Legislation", online: <<http://www.amicc.org/usicc/legislation>>.

³² The *Rome Statute*, supra, note 4, art 124.

³³ i.e., July 1, 2002.

³⁴ See the *Kampala Amendment*, supra, note 11, para 3(4).

international crimes, such as piracy and slave trade³⁵. By doing this, the impunity of state officials regarding these presently uncovered crimes may reduce.

11) Finally, the present lopsided nature of efforts to disregard/abolish state immunity in the international criminal justice system whereby only officials of less developed states are stripped of their immunity and tried and punished should be changed. All existing response mechanisms should extend their anti-immunity efforts to high-ranking officials of all states, strong or weak, who commit international crimes. This would supplement the suggestion in (5) above as to the establishment of permanent and jurisdictionally harmonized international criminal tribunal mechanisms in all regions (and, if possible, sub-regions) of the world.

6.4 Conclusion

The state immunity rule evolved in international law principally to promote mutual respect for the sovereign equality and political independence of all states by ensuring that no one state or any of its high-ranking officials is impleaded before the municipal tribunals of another state without the consent of the former. From the examination of this rule, it is evident that its application in the international criminal justice system results in significant social, political, economic, and other problems that outweigh its benefits. Many high-ranking state officials who benefit from the rule abuse it, so that many of its commendable rationales are substantially defeated.

The desire to overcome these problems and to ensure individual accountability and justice in the international criminal justice system led the international community to create

³⁵ Although these two mentioned crimes may be unlikely committed by state officials, it is the possibility is not completely ruled out that a state official can unexpectedly involve in any of them. Thus, if the anti-state-immunity regimes of these mechanisms are not extended to them, there is the likelihood that the culpable state official will be shielded from accountability before national courts by the state immunity rule.

various legal mechanisms to disregard or abolish the immunity of officials in relevant international criminal proceedings. Consequently, today, high-ranking officials of a state (including its past or incumbent heads of state and/or government) can be tried and punished by competent foreign or international judicial tribunals for some international crimes committed in the abusive exercise of their state's official /public powers. Many of these officials have already been so tried and punished, and others are currently undergoing their trials. Thus, the strength of the state immunity rule has weakened. It is no more a rule that affords high-ranking state officials absolute and unquestionable protection or exemption from external judicial scrutiny of their international crimes.

However, the effectiveness of the anti-state-immunity efforts is bedeviled by many weaknesses associated with the different response mechanisms. The combined effect of these weaknesses is that many culpable high-ranking state officials still escape individual accountability for their international crimes, and the problems arising from the application of the state immunity rule in the international criminal justice system invariably continue. This thesis, therefore, suggests various reforms to the mechanisms. The major impact of these suggested reforms is that they will enable the mechanisms overcome the weaknesses and become effective in responding to the problems of the state immunity rule. If the suggestions are followed, the administration of international criminal justice involving state officials will contribute to accomplishing the individual accountability and justice missions of the international criminal justice system and maintain public confidence in the system.

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